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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1028

JOSEPH DECKER, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA AND
PHILADELPHIA HOUSING AUTHORITY,
Respondents.

INDIVIDUAL DEFENDANTS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(For Names of Counsel See Inside)

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

FRANK L. SEAMANS
WILLIAM H. PENTZ
10th Floor Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioners
Joseph J. Decker and Daniel J. Quinn

J. ROBERT MAXWELL
Rockwell Standard Building
Pittsburgh, Pennsylvania 15222
Counsel for Petitioner
Stanley Backner

JOHN D. RAY
640 Fourth Street
Beaver, Pennsylvania 15009
Counsel for Petitioner
Robert E. Casner

ALEXANDER UNKOVIC
1424 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner
Norman R. Held

THOMAS M. KERR, JR.
Graduate School of Industrial Administration
Carnegie-Mellon University
Pittsburgh, Pennsylvania 15213
Counsel for Petitioner
Robert J. Pierson, Jr.

J. CRAIG KUHN
1514 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner
George W. Kelch

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UNITED STATES OF AMERICA AND
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Respondents.

INDIVIDUAL DEFENDANTS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 18, 1967.

Petitioners herein are individual defendants in a criminal antitrust action. A petition for a writ of certiorari has also been filed by corporate defendants in the same action seeking review of the same judgment.

CITATION TO OPINIONS BELOW

The opinion of the District Court granting an injunction to petitioners and other defendants in the criminal antitrust action before it is printed in Appendix B. The opinion of the Court of Appeals, which reversed the judgment of the District Court, is printed in Appendix A hereto.

JURISDICTION

Jurisdiction for this Court to review by writ of certiorari the judgment of the Court of Appeals is conferred by the provisions of 62 Stat. 928 (1948), 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can a Federal Criminal Court, in order to insure a fair, speedy trial, to protect the Constitutional rights of individual persons who are defendants in a criminal action and to prevent other inherently unfair and prejudicial effects in violation of the Constitutional requirements of due process, enjoin pretrial proceedings in related civil litigation arising in another Federal district subsequent to the commencement of the criminal action?

2. Can a Federal Criminal Court enjoin all defendants in a criminal action before it from participating in pretrial proceedings in related civil litigation arising in another Federal district subsequent to the commencement of the criminal action in order to protect the Constitutional rights of the individual defendants in the criminal action?

3. Can a Federal Criminal Court enjoin pretrial proceedings in civil litigation arising in another Federal district subsequent to a related criminal case in order to prevent the prosecution in the criminal action from securing advantages to which it would not otherwise be entitled under the Federal Rules of Criminal Procedure?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U. S. CONSTITUTION

Amendment V

(Excerpted in pertinent part)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 2. Purpose and Construction. These Rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 57(b). PROCEDURE NOT OTHERWISE SPECIFIED. If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

STATEMENT OF THE CASE

Petitioners herein are *individual defendants* in a Criminal Action at No. 66-295 arising under the anti-trust laws which is pending in the Federal District Court for the Western District of Pennsylvania. There is also a related Criminal Action at No. 66-296*

A petition for writ of certiorari has been filed simultaneously herewith by the corporate defendants in both criminal cases. The Individual Defendants believe, however, that the action of the Court of Appeals in reversing the order of the District Court is particularly prejudicial to them as individual defendants in the criminal action, and they wish to emphasize some respects in which the conduct of pretrial discovery in the related treble damage actions pending in other jurisdictions will have this effect even though they are not parties to the civil actions.

The Individual Defendants have, both in the proceedings before the District Court and before the Court of Appeals, filed separate briefs setting forth the vital

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*The Individual Defendants are: Stanley S. Backner, Robert E. Casner, Joseph J. Decker, Norman R. Held, George W. Kelch, Robert J. Pierson, Jr., and Daniel J. Quinn and are referred to herein as the "Individual Defendants". The other defendants in the criminal actions are referred to as the "corporate defendants", while all of the defendants are collectively referred to as the "defendants". The Individual Defendants are indicted only at No. 66-295. The Federal Court for the Western District of Pennsylvania is referred to herein as the District Court and the United States Court of Appeals for the Third Circuit is referred to as the Court of Appeals.

importance of the issues now before this Court. In addition, the Individual Defendants filed a separate Motion for Injunction on July 25, 1967 requesting the District Court to enjoin all of the defendants in both criminal actions, and their agents and attorneys, from participating in the civil actions in the Federal Court in the Eastern District of Pennsylvania.

On July 28, 1967, the District Court (acting through Judge Louis Rosenberg) issued an order enjoining certain proceedings in the related civil actions and also restraining all defendants in both criminal actions from responding to or participating in any of such civil actions.

The Court of Appeals reversed the District Court, stating that the rights of the Individual Defendants, although substantial, were not breached or injured in any way by the conduct of pretrial discovery and other proceedings in the related civil cases and that the District Court's Order of July 28, 1967 was not a necessary or proper means of protecting these rights. The Court of Appeals further stated that any protection required by the Individual Defendants could be provided by the district court in the civil cases or by the Court of Appeals itself. Additional facts are set forth in the Petition on behalf of the corporate defendants.

The Court of Appeals failed, however, to discuss and to meet the grave objections raised by the Individual Defendants to the procedures approved by the Court of Appeals. Since these objections are concerned vitally and directly with the Individual Defendants' constitutional rights, this Petition has been brought.

REASONS FOR GRANTING THE WRIT

This Petition presents a substantial and important question concerning the administration of criminal justice in the Federal courts. That question arises out of the strikingly different policies underlying pretrial disclosure in civil and criminal cases. This case poses the question whether and how those different policies should be adjusted or harmonized when they collide in concurrent civil and criminal litigation.

I

The Predicament of the Individual Defendants

Counsel for each of the seven Individual Defendants who have filed this Petition are genuinely perplexed and concerned. As all counsel see it, either all civil discovery must stop until the Individual Defendants have been found guilty or not guilty in the pending criminal case or else counsel for the Individual Defendants will have to take an active part in each civil discovery proceeding, even though the Individual Defendants are not parties to those cases.

Referring specifically to these seven Individual Defendants: Stanley S. Backner and George W. Kelch have, since the time involved in the Indictment against them, ceased to be employed by any of the corporate defendants, while Daniel J. Quinn has retired from his employment by a corporate defendant since that time.

Thus, three of these seven individual defendants are no longer employed by the corporate defendants and have no relationship with them. They do, however, like the other Individual Defendants, face the prospect of going to jail.

Reasons for Granting the Writ.

The whole thrust of the Indictments in the District Court concerns what was said and done by these Individual Defendants. The corporate defendants have no independent knowledge or information about the alleged meetings in which the Individual Defendants participated. The only way the corporate defendants can respond to interrogatories or depositions is to reflect in some manner what some other person in the corporation has been told about the activities of the Individual Defendants.

Of course, the civil plaintiffs may not under the Fifth Amendment to the Constitution be able to take the depositions of these Individual Defendants, but the plea we make here on behalf of these Individual Defendants is:

1. They should not be required to go into each district where a civil case is pending to get a protective order against having their depositions taken, and

2. Any discovery response made by the corporate defendant, with which an Individual Defendant was associated at the time mentioned in the Indictment, is bound inevitably and directly to involve the Individual Defendant.

Accordingly, the Individual Defendants, we believe, are necessarily involved in any discovery in related civil cases which, of necessity, is concerned with the activities of these Individual Defendants during the period of the Indictment.

There is no way to give the Individual Defendants the same safeguards as are furnished to other criminal defendants, if discovery proceeds in the civil cases.

II

The Decision Of The Court Of Appeals Below, By Permitting Civil Pretrial Discovery At The Present Time, Would Violate The Letter And Spirit Of The Fifth Amendment Privilege Against Self-Incrimination.

The allowance of any premature discovery activities in the related civil actions would violate the letter and spirit of the Individual Defendants' rights against self-incrimination under the Fifth Amendment to the United States Constitution. An individual never should be required to give any evidence against his will which might thereafter be used against him in a criminal case; this includes not only evidence directly supporting the criminal charge but any evidence which might form a link in the chain of proof: *Hoffman v. United States*, 341 U.S. 479, 481 (1951). As this court has recently indicated, the privilege against self-incrimination is extremely broad in scope: *Schmerber v. California*, 384 U.S. 757, 763-764 (1966).

Counsel for the Respondent have indicated that there is no intention to take the depositions of the Individual Defendants. This argument is not persuasive and overlooks the fact that there are presently pending civil treble damage actions not only in the Eastern District of Pennsylvania, but also in the Western District of Pennsylvania, the Northern District of California and the District of Columbia. In addition, since the criminal action has tolled the Statute of Limitations, other treble damage actions may well be brought against the corporate defendants it is entirely probable that some of these plaintiffs will wish to take the depositions

of the Individual Defendants. Thus, each Individual Defendant would be required in each instance to move to quash a subpoena to testify, which motion may or may not be granted, or to seek some sort of protective order limiting the scope of the deposition. Either course of action is most unsatisfactory and perilous for each of the Individual Defendants for several reasons.

First of all a great deal of each Individual Defendant's time and effort would be required to defend against the deposition, which would distract the Individual Defendant from his defense of the criminal case. More important, however, is the fact that a number of different courts throughout the country will eventually be involved, and the attitudes and actions of the various courts may not be consistent. Thus, one court might consider a certain line of inquiry at a deposition as being precluded because of the Individual Defendant's constitutional privilege while a different court might consider the same line of inquiry as not infringing on the same individual's right with the result that different orders may be in effect governing the same subject, which subject vitally affects the duty of the criminal court to give the Individual Defendants a fair trial. Only an order like that issued by the District Court below can achieve uniformity in this critical area.

The Court of Appeals in its opinion, has indicated that the rights of the Individual Defendants will be protected by the trial courts in the civil actions upon application by the Individual Defendants. This overlooks the fact, as pointed out above, that more than one court is involved and the decisions of these courts

may conflict. In any event, much time and effort would be required by each of the Individual Defendants in applying to the various civil trial courts for protective orders or in objecting to discovery proceedings and in possible appeals from such orders to the respective courts of appeals, with the inevitable result that the Individual Defendants will be seriously hampered in their defense of the criminal case.

Further, if civil pretrial discovery is permitted to proceed at this time prior to the criminal trial, the Individual Defendants who are called to testify or to produce their papers will be forced to assert their constitutional privilege against self-incrimination even though they might prefer not to do so. Surely it would be prejudicial to compel them to make that very serious decision prematurely. Unfortunate consequences often result from any assertion of the Fifth Amendment right to refuse to testify. One example is the kind of adverse publicity which is referred to in Section IV hereof. See also *Ullmann v. United States,* 350 U.S. 422 (1956).

This Court has already granted certiorari in the case of *United States v. Simon,* 262 F. Supp 64 (S.D. N.Y. 1966), reversed, 373 F.2d 649 (2nd Cir. 1967), *cert. granted sub. nom., Simon v. Wharton,* 386 U.S. 1030 (1967). In that case, the civil case had commenced prior to the related criminal action and the individuals had already given some testimony on deposition prior to that time. Even so the court in the criminal case enjoined proceedings in the related civil case in another Federal district. The Court of Appeals for the Second Circuit reversed the court in the criminal case. The

Court of Appeals, however, did assume that the court in the criminal case had the authority to enjoin the civil proceedings in order to insure a fair, orderly criminal trial (the case was remanded for dismissal on December 18, 1967 (36 United States Law Week 3252) by agreement by the parties that the issue was moot.

The present Petition shows an even more urgent case for review by this Court than the *Simon* case, since in the present situation the criminal indictments preceded the civil cases and no civil testimony or discovery has as yet taken place. Thus, the rights of the Individual Defendants to a fair trial in the criminal case can be fully protected.

There are also many other cases in which lower courts have stayed or enjoined pretrial discovery in civil actions, until the disposition of companion criminal cases, on the grounds that to require the defendant to submit to such discovery would be oppressive and would infringe on the right against self-incrimination. E.g., *Paul Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953), involving an antitrust treble damage action; *Perry v. McGuire*, 36 F.R.D. 272 (S.D. N.Y. 1964) and *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952), involving fraud actions.

Moreover, the spirit of the Fifth Amendment privilege would be violated by the allowance of any premature discovery against the corporate defendants in the criminal cases even if the Individual Defendants themselves are not summoned to testify. Even to require the corporate defendants to respond to voluminous pretrial discovery involving the Individual

Defendants would adversely affect the Individual Defendants and could violate their constitutional rights. As we have seen in the case of *Schmerber v. California*, 384 U.S. 757 (1966), the Fifth Amendment privilege is quite broad and should not be lightly infringed upon. Thus, the mere fact that the Individual Defendants are not parties to the civil actions and the fact that the civil pretrial discovery is directed to the corporate defendants only, should not be allowed to obscure the actual situation.

The basis of both the pending criminal cases and of the related civil actions consists of certain alleged activities in connection with the meetings of the Plumbing Fixture Manufacturers Assocation, in which the Individual Defendants are alleged to have taken part. Much of the information which the civil plaintiffs are seeking to obtain by the use of civil discovery techniques directed against the corporate defendants is within, and only within, the specific knowledge of the Individual Defendants and could come from no other source. The corporate defendants will have to go to the Individual Defendants for this information, which would place the Individual Defendants in a serious dilemma. If they furnish the information to the corporations from their personal knowledge and records, then the Government will have the advantage of much information to which it is not otherwise entitled, with the concomitant risk that some of such information might tend to be incriminating to the Individual Defendants. If, on the other hand, the Individual Defendants refuse to provide the requested information, the corporate defendants will, nevertheless, be made to respond to the civil pretrial discovery proceedings as required by the

Federal Rules of Civil Procedure. Inaccurate or incomplete responses by the corporate defendants (due to failure to check with the Individual Defendants) may also seriously prejudice the Individual Defendants. Similar considerations led trial courts to stay discovery proceedings even against corporate defendants in the analogous case of *Paul Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953).

It is equally clear that the District Court was also concerned with such considerations in the Order of July 28, 1967, staying proceedings in the civil cases and in restraining all defendants from responding to or participating in them. The District Court felt that in its capacity as the criminal court it is responsible for insuring that the Individual Defendants' rights are not denied them and that these rights would be seriously threatened or destroyed by a failure to recognize that much of the information requested of the corporate defendants must necessarily come from the Individual Defendants. As the District Court stated in its Opinion (Appendix B):

> "While the individual criminal defendants are not directly defendants in the Philadelphia cases, they are so interlinked in the overall picture so far as any conspiratorial evidence may appear, that it becomes vital at this time. We cannot anticipate or prophesy what will be divulged by answers and production of documents in discovery proceedings, but we may reasonably believe that matters prejudicial to all of the defendants will be divulged at a time prior to that during which they will be compelled to stand trial for the criminal charges. Once this occurs, like the opening of Pandora's box,

it may never be recalled or cancelled out. It will then have been too late. It is presently proper to prevent such a probable happening in the future. I now justify that consideration additionally as based upon my examination of the interrogatories and requests for production of documents."

III

The Decision Of The Court Of Appeals, By Permitting Pretrial Discovery At The Present Time, Would Give The Government Advantages To Which It Is Not Entitled Under The Federal Rules Of Criminal Procedure.

The rule that the Government should not be permitted to have the benefit of pretrial discovery through a civil action to which it is not entitled under the Federal Rules of Criminal Procedure is one of fundamental fairness which is of great importance to any indicted individual for the following reasons:

A. The Government Will Gain Access To Information It Cannot Get Under The Criminal Rules.

If the various civil actions are permitted to proceed unchecked, the defendants in the criminal cases undoubtedly will be compelled to disclose information to which the Government will gain access. Regardless of whether it ever is presented at the trial of the criminal actions in the form of evidence, such information might be utilized by the Government in preparing the prosecution in the criminal cases. Even requiring the Individual Defendants to assert their Fifth Amendment privilege in response to a summons to testify could well provide the Government with information as to areas which the

Individual Defendants feel are particularly sensitive. Moreover, even if the Individual Defendants are not themselves deposed in the civil actions, there is an obvious risk that the testimony and records produced by other parties might include inaccurate accusations against the Individual Defendants or that such discovery otherwise could color the attitude of the prosecution against the Individual Defendants, without their having any opportunity to be present to protect their interests.

B. The Government Will Know In Advance Of The Criminal Trial Whether The Individual Defendants Will Invoke The Fifth Amendment.

Any civil discovery (whether by production of documents, answers to interrogatories or depositions and whether from the Individual Defendants or from any other defendants) could disclose prematurely the facts and defenses on which the Individual Defendants will rely at the time of their criminal trial. The practical effect would be to give the Government the unfair advantage, not permitted by the Federal Rules of Criminal Procedure, of being able to anticipate the trial positions of the defendants, while the defendants will have no comparable preview of the case to be presented against them.

The Government receives an undue advantage if it knows prior to the beginning of the criminal trial whether the Individual Defendants will take the stand or utilize their Fifth Amendment privilege. The whole strategy of the Government's case will vary depending upon whether they expect the Individual Defendants to

testify. Traditionally, the Government has no right to inquire in advance about this, and if the plaintiffs in the civil cases, by virtue of their discovery proceeding, make the Individual Defendants declare their hand before the beginning of the criminal trial, the Government will know what kind of defense the Individual Defendants are going to put on and thus will gain a tremendous advantage which the Government could not obtain on its own motion.

IV

The Decision Of The Court Of Appeals By Permitting Civil Pretrial Discovery At The Present Time Would Produce Other Inherently Unfair And Prejudicial Effects In Violation Of The Letter And Spirit Of The Constitutional Requirement Of Due Process.

The Individual Defendants respectfully submit that the constitutional privilege against self-incrimination does not, important as it is, exhaust the Individual Defendants' rights to a fair trial in accordance with constitutional requirements of due process.

This Court has held in a number of cases and in a variety of situations that lower courts should take action to prevent any substantial possibility of unfairness from occurring in a criminal case, even without proof of the actual effect of the practice in question. Thus, in its opinion in the case of *In Re Murchison,* 349 U.S. 133 (1955), this Court stated (at p. 136):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

The most obvious way in which the Individual Defendants might be prejudiced would be through the extensive publicity which could result from any testimony on deposition or from any refusal to testify on the Fifth Amendment grounds. Two recent decisions of this Court are directly in point: *Sheppard v. Maxwell,* 384 U.S. 333 (1966); and *Estes v. Texas,* 381 U.S. 532 (1965). In each of them a conviction was reversed because of the inherently prejudicial effect of extensive publicity even though actual prejudice to the defendants could not be proved. The use of television in the courtroom in the *Estes* case and the blatant news coverage in the *Sheppard* case were regarded as having such an inherent likelihood of preventing the defendants from obtaining a fair trial that they should have been avoided from the outset in the interests of due process and sound judicial policy. Similarly, the Order of July 28, 1967, is an effort to eliminate the substantial risk at the outset by enjoining the taking of any premature civil discovery.

Although the Court of Appeals felt that public disclosure of such information could be prevented by protective orders issued by the civil trial court, it failed to take account of the fact that there are, presently, at least four civil actions pending before at least four different courts and a number of different attorneys involved, so that it is clear as a practical matter that any information elicited by pretrial proceedings cannot effectively be kept from public knowledge.

The allowance of unlimited civil discovery at this time would be prejudicial to the Individual Defendants in a number of other ways as well. Among the more serious of them would be the tremendous cost and incon-

venience to which they would be put if they were forced to keep track of a large number of actual and potential lawsuits, any one of which might affect the interests of the Individual Defendants even though they technically were not parties. Any civil discovery prior to the conclusion of the criminal proceedings probably will turn out to be an inconclusive, inefficient and unequal waste of time and resources.

CONCLUSION

This Petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK L. SEAMANS
WILLIAM H. PENTZ
10th Floor Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioners
Joseph J. Decker and Daniel J. Quinn

J. ROBERT MAXWELL
Rockwell Standard Building
Pittsburgh, Pennsylvania 15222
Counsel for Petitioner
Stanley Backner

JOHN D. RAY
640 Fourth Street
Beaver, Pennsylvania 15009
Counsel for Petitioner
Robert E. Casner

ALEXANDER UNKOVIC
1424 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner
Norman R. Held

THOMAS M. KERR, JR.
Graduate School of Industrial Administration
Carnegie-Mellon University
Pittsburgh, Pennsylvania 15213
Counsel for Petitioner
Robert J. Pierson, Jr.

J. CRAIG KUHN
1314 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner
George W. Kelch

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16764

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, KOHLER CO., CRANE CO., WALLACE-MURRAY CORPORATION, UNIVERSAL-RUNDLE COPORATION, RHEEM MANUFACTURING COMPANY, BORG-WARNER CORPORATION, BRIGGS MANUFACTURING COMPANY, PLUMBING FIXTURE MANUFACTURERS ASSOCIATION, JOSEPH J. DECKER, DANIEL J. QUINN, NORMAN R. HELD, ROBERT E. CASNER, JOHN B. BALMER, STANLEY S. BACKNER, ROBERT J. PIERSON, JR. AND GEORGE W. KELCH.

PHILADELPHIA HOUSING AUTHORITY
(INTERVENOR),

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 25, 1967
Before: McLAUGHLIN, HASTIE and FORMAN,
Circuit Judges.

Opinion of the Court
(Filed December 18, 1967)

By HASTIE, *Circuit Judge.*

This appeal has been taken from an order entered in two criminal antitrust cases in the District Court for the Western District of Pennsylvania temporarily restraining any further proceedings in certain civil anti-

trust suits that are pending in the Eastern District of Pennsylvania.

The criminal prosecutions and the civil suits arose out of the same alleged violations of the antitrust laws. The defendants in the civil actions are corporations that are engaged in the manufacture of plumbing fixtures and their trade association. These same corporate defendants and individual corporate officers are the defendants in the criminal prosecution. The indictments were returned October 6, 1966 and the civil actions were filed December 2, 1966.

In the Eastern District civil suit, after interrogatories and a motion to produce documents had been served, the defendant corporations moved to stay all proceedings until the termination of the Western District criminal actions. This motion was denied. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 1967, 269 F. Supp. 540.

Thereafter, in the Western District criminal actions, the corporations, which were defendants in both actions, joined with the corporate officers, who were defendants in the criminal actions only, in the present motion to restrain further proceedings in the civil actions. In addition, the individual criminal defendants asked the court to enjoin them and their corporate codefendants from taking any responsive steps in the civil actions. The court then both temporarily enjoined the civil plaintiffs from requiring answers, discovery or the production of documents and temporarily enjoined the criminal defendants, corporate and individual, from responding to pleadings, interrogatories or motions to produce documents in the civil cases. This appeal by Philadelphia

Housing Authority, a plaintiff in one civil action and one of the enjoined parties, testing the injunction for all, followed.

In this case the District Court for the Western District of Pennsylvania has interrupted and enjoined the normal course of procedure in a case pending in the coordinate District Court for the Eastern District of Pennsylvania after the latter court had considered and denied a request for substantially the same interim relief. Within a single circuit where decisions of all district courts are reviewed by a single court of appeals, there is rarely need or justification for action by one district court interfering with the course of litigation pending in another. And certainly, if the injunctive relief sought in the sister court has been requested by the aggrieved parties and denied in the court whose proceedings are sought to be restrained, the sister court should hold its hand. *Cf. Hilton Hotels Corp. v. Weaver,* D. C. Cir., 1963, 325 F.2d 1010; *Trees v. Glenn,* 1935, 319 Pa. 487, 181 Atl. 579. The proper and orderly procedure, which the aggrieved corporations avoided in this case, is an appeal from the court which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal.

In this way the unnecessary appearance of unseemly conflict between coordinate courts in a single circuit is avoided. Moreover, judicial time is conserved and unnecessary expense is avoided by going directly to the appellate court after the first adverse ruling, rather than seeking a conflicting trial ruling elsewhere with the prospect that in any event the matter in dispute will then be appealed. "The economic waste involved in dup-

licating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. . . . Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties." *Crosley Corp. v. Hazeltine Corp.*, 3d Cir., 1941, 122 F.2d 925, 930.

In addition to the arguments made by all of the criminal defendants, the individual corporate officers urge that their claim to injunctive relief is supported by compelling special considerations. These individuals were not parties to the civil actions or to the unsuccessful motions made therein for stays of proceedings. Thus, the motions made in the criminal action were their first request for relief. Moreover, unlike their corporate co-defendants, they have a constitutional privilege against self-incrimination. They express apprehension that this privilege may be violated by discovery in the civil suit. And even if damaging disclosures in the civil case should not involve any violation of this constitutional right, they contend that the publication of disclosures required by the corporations concerning internal transactions involving the indicted corporate officers is likely to subject the individuals as well as the corporations to unfair prejudice at the criminal trial.

The claim of deprivation of constitutional right is not well taken. Admittedly, no effort has been made to take the depositions of the individual criminal defendants, nor is there reason to anticipate any such effort. And should any such effort be made the court in the

civil action and, if necessary, this court can be relied upon to protect the constitutional right.

The other claims of the individual defendants are more substantial. They cannot be faulted for not seeking relief in the civil actions where they were not parties. Thus they, different from the corporate defendants, were entitled to have the merits of their claims adjudicated on first presentation in the criminal actions.

On the merits, we know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him. See *United States v. Simon,* S.D.N.Y. 1966, 262 F. Supp. 64, 78, *rev'd on other grounds,* 2d Cir. 1967, 373 F.2d 649. However, we recognize that widespread publication of such evidence in advance of the criminal trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant. Here again, we think the civil court, if alerted to any such danger as presented by a particular demand for information, can adequately protect the individual defendants against it. Indeed, in denying the motion to stay proceeding the court in the civil action said:

> "If, in the future, the criminal action approaches an involved stage and the plaintiff's discovery, pending at that time, reaches such proportions as to seriously interfere with the defense of the criminal actions, application can readily be made to this court for appropriate relief, such as a short term protective order."

Moreover, disclosures which may indicate the complicity of the defendants, individual or corporate, in the crime charged need not be made available to the media of public information. Indeed, only the civil judge and the civil plaintiffs' counsel need know what is disclosed, and counsel can be expressly enjoined from sharing the information with other persons pending the criminal trial.[1] Of course, the actual trial of the civil case can and should be postponed until after the criminal trial if it appears that the proof of the plaintiffs' case in open court may result in publicity hurtful to the criminal defendants.

We emphasize that the district court before which the civil antitrust suits are pending has not closed the door to any objections the criminal defendants may make to the answering of particular interrogatories or the production of particular documents. If they can show that a response to a particular demand in the civil suit is likely to injure them unfairly in the criminal actions, they are free to do so. The trial court has done no more than to reject blanket claims that procedurally the civil suits should remain at standstill and that no discovery whatever should be permitted until the criminal actions shall terminate.

We find it unnecessary to consider the appellant's contentions that the court below did not acquire per-

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1 This is quite unlike the situation in which a party to a criminal prosecution is demanding discovery in a civil suit as a means of obtaining advance disclosure of what the other side will be able to prove in the criminal case. Contrast *Campbell v. Eastland*, 5th Cir., 1962, 307 F.2d 478.

sonal jurisdiction over it. Neither is it necessary to decide whether any case or controversy was presented by the ingenious request of the individual defendants that they themselves and their cooperating codefendants be restrained from taking the very steps which they wish to avoid.

The judgment of the district court will be reversed and its injunction set aside.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.	Criminal No. 66-295

UNITED STATES OF AMERICA v. PLUMBING FIXTURE MANUFACTURERS ASSOCIATION, et al.	Criminal No. 66-296

Opinion

ROSENBERG, *District Judge*

This follows the decree for a preliminary injunction entered on July 28, 1967. This matter is here on four motions. The first motion was filed by the defendants in the two above entitled criminal actions to re-

strain and enjoin certain plaintiffs and party intervenors in civil actions, filed in the United States District Court for the Eastern District of Pennsylvania, from compelling the criminal defendants to file answers to the civil complaints and respond to discovery, particularly to interrogatories as filed in the civil actions.

The second motion was filed by counsel for some of the plaintiffs and party intervenors in the Philadelphia actions to dismiss the first motion as here filed by the defendants. The third motion, also a motion for injunction, was filed after the argument was had on the first two motions, by counsel for all the individual defendants in one of the criminal cases, to enjoin the corporate and co-defendants in the criminal cases and their agents from filing answers to complaints in Philadelphia and from otherwise divulging any matters in such civil proceedings, which matters may be relevant in the two pending criminal cases. A petition for leave to intervene was then filed by the plaintiff Philadelphia Housing Authority and a motion to dismiss the individual defendants' motion for injunction was also filed. The defendants objected to this petition at this point because the plaintiffs had already been served on the first motion for injunction.

I shall here identify the first motion as the (criminal) defendants' motion, as it comes from all the defendants in the two pending criminal actions in the Western District Court; the second motion as the (civil) plaintiffs' motion, as it comes from the party plaintiffs and intervenors in the Eastern District Court of Pennsylvania; the third motion as the individual (criminal) defendants' motion; and the fourth pleading as the plaintiffs' petition and motion.

The facts in this case are simple. After an extensive grand jury investigation into activities of plumbing manufacturers throughout the United States, a grand jury at Pittsburgh, Pennsylvania, on October 6, 1966, presented two indictments, charging antitrust violations, against the defendants named in the two criminal actions. These are numbered 66-295 and 66-296. On the same date the United States also filed a civil action at No. 66-1184 in the District Court for the Western District of Pennsylvania, charging antitrust violations and seeking injunctive relief.

The first indictment at Criminal No. 66-295 charges eight corporate defendants, a trade association and eight individual defendants, with engaging in a conspiracy, in violation of Section 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act. The indictment charges, in substance, that the defendants conspired to fix the prices of enameled cast iron and vitreous china plumbing fixtures beginning sometime in September 1962 and continuing at least until sometime in 1966.

The second indictment at Criminal No. 66-296 charges ten corporate defendants and their trade association with engaging in a conspiracy in violation of Section 1 of the Sherman Act, in that such defendants conspired to fix the prices of staple vitreous and china plumbing fixtures beginning in November 1960 and continuing to June 1962.

On November 15, 1966, at the arraignment, all the defendants pleaded not guilty. Appearances of counsel had previously been entered for all the defendants. On November 3, 1966, an order was entered on agreement

of all counsel to hold Civil Action No. 66-1184 in abeyance and to continue the same until further order of court.

A number of conferences were held by counsel and orders were made relating to the procedure to be followed. The defendants then filed joint motions to dismiss the indictments and to suppress evidence, and motions for pretrial. Four separate motions to dismiss were also filed by three individual defendants and one corporate defendant. The defendants sought *en camera* proceedings in the hearings on evidence on their motions to suppress the evidence. On May 10, 1967, an order was entered providing for *en camera* argument to determine the necessity for *en camera* hearing of testimony on the motions to suppress. At the argument counsel for the Government and the defendants were directed to file affidavits, which each side eventually did. Determination of this matter is in the process of completion and will be filed shortly.

In the meantime, on December 21, 1966, in the District Court for the Eastern District of Pennsylvania, certain plaintiffs filed two civil actions at Nos. 41773 and 41774, based upon the indictments as found at Criminal Nos. 66-295 and 66-296 in this District, claiming treble damages against all corporate defendants.

In the first numbered case the action was brought by the Philadelphia Housing Authority as a class action in behalf of "all state and municipal governments, governmental agencies, authorities and subdivisions which build or renovate homes and apartment dwellings . . ." In this proceeding the States of Alaska and Michigan

and various municipal and political governments and subdivisions or their authorities proceeded to become party intervenors.

The second numbered action was filed by Lindy Bros., Inc. of Philadelphia as a class action on behalf of "approximately 16,000 builders of home and apartment dwellings throughout the United States . . ."

The record before me indicates that forty-nine parties have sought to become intervenors. Both civil actions in the Eastern District Court were assigned as protracted cases to Judge John W. Lord, Jr. A series of motions and a number of hearings were had before Judge Lord as they related to continuances or postponements by the defendants for the filing of answers to the complaints in these civil actions and to postponing or continuing of the time for the filing of answers to the plaintiffs' interrogatories or other discovery processes.

A number of postponements were granted and Judge Lord, at my request, allowed still further time after the motion for injunction was filed here so that I could hear the parties and inquire into the voluminous pleadings and affidavits and briefs that had been presented to me during the time when I was away from my duties.

Prior to these postponements, Judge Lord had, after filing a comprehensive Memorandum and Order, stated that the plaintiffs in the civil actions had certain rights which should not be prejudiced by any delaying actions of the defendants, and that the requirement for the defendants to answer the complaints and interrogatories did in nowise prejudice the defendants because

protective rights would be available to them during the actual discovery processes. On June 7, 1967, he denied the defendants' motions for a stay of all proceedings. Since Judge Lord's continuance protected the defendants until July 31, 1967, an argument on the first two motions was ordered by me to be held July 24th.

On June 30, 1967, all the defendants in both criminal actions filed a motion for injunction at Pittsburgh seeking to enjoin and restrain the plaintiffs and party intervenors in the civil actions at Philadelphia from compelling them as defendants in the civil actions to file answers either to the complaints or interrogatories, based upon practically the same reasons as were urged before Judge Lord. Immediately thereafter, counsel for the plaintiffs and party intervenors filed a motion to dismiss the defendants' motion, for the reasons (1) that service upon the lawyers of record was not service upon the parties; (2) that in any event it was not service upon all the defendants and intervenors; (3) that the Western District Court, being a court of concurrent jurisdiction could not oust the District Court for the Eastern District of Pennsylvania from its jurisdiction previously acquired; and (4) that the determination by Judge Lord being one based upon his discretionary power was in all events valid and the law of the case.

At the July 24th hearing,[1] all arguments on the first two motions were heard. Counsel for the plaintiffs in the second motion were first heard on the question

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1. The United States Attorney was present at this and the second hearing or argument, but took no part either way.

of jurisdiction, as they had indicated their desire to be heard, without submitting to the jurisdiction of this court.

The defendants argued that Federal Rules of Criminal Procedure Nos. 4(c)(2),[2] 17(e)(1),[3] 49(b),[4] and 57(b), [5] vest every federal district court in criminal actions with power to protect and extend its jurisdiction throughout the United States, and that another source of power is the historic All Writs Act, 28 U.S.C. §1651.[6] Their basic argument for relief was that they

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2. 4(c)(2). Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

3. 17(e)(1). Place of Service. (1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

4. 49(b) Service: How made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

5. 57(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute. As amended Dec. 27, 1948, eff. October 20, 1949.

6. §1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

would be unduly burdened in being compelled to present a defense to the civil actions in Philadelphia, particularly as it related to the multitudinous and burdensome discovery there, while at the same time they were required to prepare their defenses to the criminal actions at Pittsburgh; and that they would be deprived of due process of law by a fair trial in these criminal proceedings, and be unduly prejudiced if they were compelled to present evidence against themselves or against the other co-defendants, if so compelled to do in the Philadelphia civil proceedings.

During the argument counsel for the individual defendants (Criminal No. 66-295) suggested his likely intention of further protecting these individual defendants by a motion to enjoin the co-defendants from proceeding with discovery or pleading in civil actions at Philadelphia or elsewhere. This was filed on July 25th, and a hearing was set for July 28th. Argument was had, and the contentions of the movant individual defendants were essentially the same as those presented for the earlier motion for injunction. The individual defendants argued that any information which might be divulged by the officers of the co-defendant corporations would also prove prejudicial to their rights as defendants in the criminal case.

The plaintiffs' counsel, who appeared on July 24th, Mr. David Berger and Mr. Aaron Fine, also appeared at the July 28th hearing and argued against the motions. At the same time, Mr. Fine presented a petition for intervention and a motion for the dismissal of the individual defendants' motion for injunctive relief on the ground that the motion presented no controversy

within the requirement of Article III, Section 2 of the Constitution of the United States because no adversary issue was presented between the individual defendants as movants and the co-defendants whom they sought to enjoin and that, therefore, the motion was collusive.

The first questions here then are (1) Do district courts have, under such circumstances as are here presented, jusisdiction to grant remedial aid to criminal defendants? If the answer to the above is "yes", then (2) What method is available for making service upon the necessary parties required to be enjoined

Both parties in their briefs and at the argument on July 24th referred to *United States v. Simon,* 262 F.Supp. 64 (S.D.N.Y., 1966), 373 F.2d 649, C.A. 2, 1967, cert. granted, sub. nom. *Simon v. Wharton,* 386 U.S. 1030 (1967). Each side has presented it as supporting the contentions of that side. The defendants point to it as authority for present jurisdiction here and as precedent for the granting of injunctive relief to threatened defendants charged with crime. The plaintiffs point to the reversal by the Court of Appeals for the Second Circuit of the District Court's order restraining the plaintiffs in the civil action in another district, as disputing the defendants' contentions to any right of relief here.

Certain defendants in the *Simon* case, supra, who were charged in the District Court for the Southern District of New York with conspiracy to commit mail fraud and to make false statements in violation of the Securities Exchange Act, applied for an order enjoining the trustee in reorganization in the Eastern District Court pending trial of the criminal action, from taking

their depositions and the depositions of other partners and employees of the firm which was charged civilly as a co-conspirator in the civil actions in the Eastern District.

The *Simon* case, supra, is not completely parallel with our action here. In *Simon* the criminal action was commenced subsequent to the filing of the civil action and after discovery had been in progress a year. Here the civil actions at Philadelphia are based on the allegations in the criminal indictments in Pittsburgh and were commenced after criminal prosecutions had started.

In *Simon,* the individual defendants declared that they were waiving constitutional privileges against self-incrimination because the claim of that privilege would damage the high reputations they held as public accounts. Here no such waiver exists, nor can any be demanded by the Government nor by me nor by anyone else. As such, the criminal defendants' rights may not be violated and must remain inviolate until the prosecution shall have presented evidence beyond a reasonable doubt in the criminal cases to support the charges as contained in the indictments and shall have met its burden as required by due process of law.

In *Simon,* the Court of Appeals for the Second Circuit reversed the District Court and indicated that because no constitutional privileges were involved, the District Court had no basis for injunctive relief. Following that, application was made to Mr. Justice Harlan, assigned to that Circuit, for a stay of the Court of Appeal's mandate and for a continuance of the injunction order as entered by the District Court, pending a

certiorari application to the Supreme Court. Mr. Justice Harlan allowed the stay and issued the following Memorandum:

> "Having considered the papers on both sides, I cannot regard the issue sought to be reviewed as insubstantial. I am also of the opinion, however, that continuance of the District Court's injunction order presently expiring by its own terms on March 16, 1967, is best left to that court.
>
> Accordingly, I dispose of this application as follows. I deny the application for a continuance of the District Court's injunction order pending certiorari, without prejudice to the petitioners promptly applying to the District Court for such a continuance. I stay the execution and enforcement of the judgment entered pursuant to the mandate of the Court of Appeals pending this Court's disposition of and determination upon the petition for certiorari, on condition however that such petition is filed on or before March 23, 1967."

When the District Court was petitioned, Judge Bryan ordered the continuance of the injunction stating,

> "Taking all the facts and circumstances into account, I conclude that there is reasonable probability that if the injunction order expiring March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it. In my view the prejudice to the defendants were the

injunction order not so continued substantially outbalances any prejudice to the Trustee and the interests he represents.

Certiorari was thereafter granted by the Supreme Court (386 U.S. 1030 (1967).

Since the granting of certiorari and the (in any event, temporary) setting aside of the Second Circuit's reversal, I have here now reliable authority by which I may be guided (at least until the Supreme Court finally indicates guidance) by Judge Bryan's determination as a precedent for the granting here to protective relief for the defendants charged in the criminal indictments. I, therefore, hold that this District Court has jurisdiction of the subject matter here presented.

Does it, however, have jurisdiction over the persons? That question was not raised in *Simon*. It is raised here. The parties present no authority as to the character of procedure or process as it relates to these motions, although they do support their contentions by the various references to the Federal Rules and judicial holdings and dicta.

I have before me a criminal proceeding, not a civil action; and I sit as a criminal court, not a civil court. Although I may look to civil and perhaps equitable precedents, I am presented with no authority which points to the Federal Rules of Civil Procedure as directing procedural process here.[7] I do not ignore Federal Rule of Civil Procedure 1 which says "Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether

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7. References to the Federal Rules of Civil Procedure 65(a) provides that "no preliminary injunction shall be issued without notice to the adverse party."

cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81." I have carefully examined Rule 81 and note with what particularity inclusions and exception are set forth for the rules of civil procedure. It contains no reference whatsoever. Nor is there anything contained in the Federal Rules of Criminal Procedure other than that which has been presented by the defendants, as previously stated.

The constitutional rights of all defendants in the pending criminal actions against them is now presented to me as a problem for protective examination. Based upon the *Simon* case, supra, I now hold as Judge Bryan there held that this court does have jurisdiction. On that assumption I have a duty to perform in this regard and I am compelled to bring before me all those who may threaten to shake constitutional mandates, as they may appear to jeopardize the defendants. Since the plaintiffs have raised the question of service, inquiry must be had as to proper basic notice being made upon the necessary partie sbefore injunctive relief could be granted to the defendants.

There is no doubt here that the attorneys representing the plaintiffs and party intervenors were served, and therefore, the necessary and sufficient connection which exists between attorneys and their clients would be sufficient notice upon which, after proper proceedings, a justification for the issuance of injunction could be had sufficient for the purposes here required.[8]

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8. This record indicates that while some of the plaintiff intervenors were notified, all the lawyers did receive notice. We consider also that notice to the State of Alaska as an intervenor would be as efficiently given to its counsel of record at Philadelphia.

I hold, therefore, that personal jurisdiction exists here at least as notice was had upon the attorneys upon whom service was made. They will be considered parties to this proceeding to preserve this court's criminal jurisdiction.

Inasmuch as the plaintiffs and party intervenors in the Philadelphia civil actions could act only through, in privity or in concert with their counsel in the circumstances, it would seem that all such parties can and should be bound by an injunction order.

In *Ex Parte Lennon,* 166 U.S. 548, 41 L.Ed. 1110 (1897), the Court said:

> "The fact that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High, Inc. §1444; Mead v. Norris, 21 Wis. 312, Wellesley v. Mornington, 11 Beav. 181."

In *Reich v. United States,* 239 F.2d 134, C.A. 1, 1956, cert. den. 352 U.S. 1004, the Court said at page 137:

> ". . . It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a person who has been enjoined

in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued or even served with a copy of the injunction. In re Lennon, 1897, 166 U.S. 548, 554, 17 S. Ct. 658, 41 L.Ed. 1110; Alemite Mfg. Corp. v. Staff, 2 Cir. 1930, 42 F.2d 832 and cases cited. See also Rule 65(d) Fed. Rule Civ. Proc. 28 U.S.C.A. . . "

The plaintiffs, in their motion to dismiss the indiviudal defendants' motion for an injunction, contend that an additional jurisdictional question is presented in that no "case or controversy" exists as between the co-defendants so as to support the jurisdiction of this court. The plaintiffs rely on several cases, *Aetna Life Insurance Co. v. Howorth,* 300 U.S. 227, 240, 241 (1937); *United States v. Johnson,* 319 U.S. 302 (1943). Neither of these cases supports the plaintiffs' contention, for each of them related to the question of the court obtaining jurisdiction of the cases in the first instance, and did not relate to the question of appropriate action by a trial judge in a case where jurisdiction is concededly already vested. Additionally, the Johnson case, supra, was based upon a finding of collusion, and I make no such finding here.

Are the defendants entitled to injunctive relief under the circumstances as here presented? The defendants contend they will be burdened if they are requird to proceed in Philadelphia and will be so inconvenienced in their defense in the criminal cases here as to deprive them of due process and a fair trial. As Judge Bryan held in *United States v. Simon,* supra, and Judge Lord held in the Philadelphia cases, the defendants have

adequate personnel and are numerous enough as defendants as to be able to bear any possible burden, though inconvenient and heavy, of both the civil and criminal actions.

The defendants contend that if they are compelled to answer at Philadelphia, their rights in the pending criminal cases to demand that the Government meet its burden and present evidence beyond a reasonable doubt against them will be prejudiced by all or any of that which they may be now constrained to present at Philadelphia. It is true that the corporations only are the degendants in the civil actions at Philadelphia and that neither they nor their officers in their corporate capacities have any rights to the Fifth Amendment privilege against self-incrimination. However, it is also true that some of the criminal individual defendants are officers of the civil corporate defendants who may be required to present answers in Philadelphia or compel those over whom they have supervision to present answers which can prejudice them in the criminal actions.

If I were to presently deny the defendants' motion, I am effectually compelling them to make answers which may tend to incriminate them in the event that the Government does not already have such information. I do not doubt that the Government agencies will be alert, as they should be, in their examination of all matters which such Philadelphia defendants might present. Should such answers be divulged under such circumstances, the Government, too, might be harmed because of the objections to the admission of any evidence at the criminal trials, and so possibly make such evidence inadmissible. In any event, one may reasonably anticipate that the defendants in the criminal trial would avail

themselves of all possible objections (as they would have the right to do) as the circumstances would present. All of which would confuse, and perhaps complicate, the due processing of a fair criminal trial. No one will doubt that I am duty-bound to respect the Government's rights even as I must respect the defendants' rights in a criminal action.

While the individual criminal defendants are not directly defendants in the Philadelphia cases, they are so interlinked in the overall picture so far as any conspiratorial evidence may appear, that it becomes vital at this time. We cannot anticipate or prophesy what will be divulged by answers and production of documents in discovery proceedings, but we may reasonably believe that matters prejudicial to all of the defendants will be divulged at a time prior to that during which they will be compelled to stand trial for the criminal charges. Once this occurs, like the opening of Pandora's box, it may never be recalled or cancelled out. It will then have been too late. It is presently proper to prevent such a probable happening in the future. I now justify that consideration additionally as based upon my examination of the interrogatories and requests for production of documents.

Seventy-one interrogatories were filed in Philadelphia. Some of these interrogatories contained multiple questions. Altogether they attempt to lay open in minute detail the grand jury proceedings by which the indictments in the criminal cases resulted and official, individual and customer activities relating to or in anywise connected with such grand jury proceedings.

The motion for production as filed in the Philadelphia civil cases lists a demand for "written, printed, typed, recorded, or graphic matter, however produced or reproduced . . .", in the period from January 1954 to December 1966 and subsequent thereto. The list enumerates forty-three numbered items for the productions so requested, which include summaries of grand jury investigations, such as subpoenas, testimony, records of various cases and a multiple number of demands for corporate, official, individual, customer and government-related matters. I now find that the constrained answering of these matters by the defendants would result in irreparable injury to the defendants and to the public as it would affect the due and orderly processing of these pending criminal cases before me.[9]

The plaintiffs argue that the issue determined by Judge Lord in the Philadelphia cases is the same as presented for injunctive remedy; that the District Court at Pittsburgh and the District Court at Philadelphia have co-existing jurisdictions; that the Eastern District Court received the first jurisdiction and that Judge Lord's discretionary determination binds the Western District Court. With this I cannot agree. The question of postponing discovery in Philadelphia is the same in both Districts, but the jurisdiction and issues as they apply in this District are different. This needs no further discussion because we may, at least for the present, accept the determination made by the District Court and not negated by the Court of Appeals for the Second Circuit in *Simon*, supra, that there is jurisdiction here.

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9. The record discloses that similarly based civil actions for treble damages have been filed in the District Court for the Northern District of California.

I should add that Judge Lord's decision was a discretionary one and properly determined under the circumstances of that case. But if the District Court is charged with the duty of conducting a fair criminal trial and has the power (or jurisdiction) to enforce it, it becomes here not one of discretion but of precept. Thus their is this distinction which refutes the plaintiffs' contention that the identical issue was discretionarily adjudicated by Judge Lord. The determination here at Pittsburgh, it appears, is not dictated by any statute or federal rule of procedure. The Supreme Court has declared it to be an inherent power in the trial judge by which the duty is imposed upon him to provide orderly and fair processing of criminal trials, both as relates to the prosecution, the defendants, and variously related third parties. *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965); *McNabb v. United States,* 318 U.S. 332 (1943).

The court's inherent power to supervise the administration of criminal justice within its jurisdiction was explained by the Supreme Court in *McNabb v. United States,* supra, at page 340, where Justice Frankfurter stressed the court's "duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The significant difference between the issue existing in Philadelphia from that in Pittsburgh was pointed out by Judge Wisdom in *Campbell v. Eastland,* 307 F.2d

478, 487, C.A. 5, 1962, cert. den. 371 U.S. 935 (1963), in these words:

> "There is a clear-cut distinction between private interest in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure."

I add only that the criminal defendants' right to due process is distinguishable from that of parties in civil actions. In the civil action testimonial compulsion of defendants is a rule. In criminal actions it is an exception.

The defendants charge that the Government will be aided by the civil discovery procedures in the Philadelphia cases and that the Government should not be indirectly granted discovery which exceeds that offered by the Federal Rules of Criminal Procedure. *Campbell v. Eastland,* supra; *United States v. Pack,* 150 F. Supp. 262, 264 (D.Del. 1957); *In re National Window Glass Workers,* 287 F. 219, 226-228 (N.D.Ohio, 1922); See also *United States v. Sermon,* 218 F.Supp. 871, 872 (W.D. Mo., 1963).

The primary duty for protecting the plaintiffs' rights lies with Judge Lord in Philadelphia. But when, as here, I exercise jurisdiction so as to interfere with the processing of a civil case, I must be mindful of the respective situations of all concerned parties, the plaintiffs at Philadelphia, as well as the Government and defendants here.

I have given considerable consideration to the possible harm which may accrue to the plaintiffs by the

granting of a preliminary injunction. I agree with Judge Lord that the plaintiffs are entitled to the right to proceed as quickly as they may in procuring the necessary information by way of Federal Rules of Civil Procedure so that they may be able to recoup whatever losses can be proved as resulting to them.

The plaintiffs complain that they will be harmed by an injunction because of the delay which is imposed on the processing of their treble damage actions, in that memories may dim with time and because of the danger of loss or destruction of the presently available and existing records of various kinds.

This contention is argumentative only and seeks support in the recent reversal by the Court of Appeals for the Third Circuit of a stay of proceedings granted by Judge Augelli in *Borda v. American Oil Co., et al.*, Civil Action No. 947-66 (D.C.N.J., 1966) (*Texaco, Inc. v. Charles A. Borda, et al.*, C.A. 3, 1967, ... F2d ...). Our Court of Appeals, while approving the overall stay pending determination of a criminal action, nevertheless permitted the deposing of Mr. Borda because of his advanced age. We have no such circumstance before us.

Therefore, while recognizing that the plaintiffs are entitled to speedy availability of discovery processes of persons and records, the delay by the granting of a preliminary injunction will not unduly cause the plaintiffs irreparable harm as weighed against the possible irreparable harm to the defendants. In fact, by a speedier disposition of the criminal actions now pending before me, the plaintiffs are likely to acquire greater

benefits from records divulged in the criminal proceedings under 15 U.S.C. §16(a).[10]

One other matter should be here discussed. The plaintiffs argue that no priority exists between the two types of actions, that they are constitutionally and equally entitled to proceed in the civil actions for damages as the defendants may be to due process and a fair trial in the criminal proceedings.

We have no directive by statute or rules of procedure as to priorities where civil and criminal proceedings clash, as they appear to do here. But we do have expression after expression for which no authority is needed on the fundamental right or preservation of life and liberty, commencing with the expression contained in the Declaration of Independence. Although property rights may have been included in particularly the words "pursuit of happiness", it is significant that the founders of our country deemed it not of such comparative importance as life and liberty as to mention it in the Declaration of Independence. The whole sentence which speaks of this is here presented as a reference to the specific words used: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This will not deny the constitutional

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10. 16(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . ."

right to property, but that raises no question here, for I can see no prejudicial results to the plaintiffs while here protecting the fundamental rights of the defendants in the pending criminal actions.

As far as constitutional priorities are concerned, we would be in an unreasonable dilemma if we attempted to equalize all constitutional rights. For instance, the right to a fair criminal trial may at times conflict with the right to freedom of the press under the First Amendment. Yet freedom of the press must give way to the extent that it interferes with due process of law and the procurement of a fair trial. *Sheppard v. Maxwell,* supra; *Estes v. Texas,* supra.

We consider any prejudice which may result to the ultimate criminal defendants from pretrial disclosures from all possible sources. In other motions in these criminal proceedings presently before me, the defendants seek en camera hearings because of local and widespread publicity attributed to the legal proceedings at Pittsburgh. Although the discovery matters at Philadelphia are presently properly pretrial matters in the civil proceedings there pending, the matters which may be disclosed there undoubtedly would receive the attention of the press. In that connection, *Sheppard v. Maxwell,* supra, gives strong cautions to trial judges. At page 362, the Court stated:

> "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the diffi-

> culty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances."

The function of the trial court is to conduct the whole proceedings — trial and pretrial — in an atmosphere of dignity and integrity, so as to shield the trial process itself from external factors. *Estes v. Texas,* supra, concurring opinion of Chief Justice Warren at 381 U.S., page 562.

At page 363, the Court added that the courts must be concerned with the protections at such times as the need for protections come to their notice. It cautioned in this respect by these words:

> "But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

It is a duty of the trial judge in such proceedings to protect the accused in a criminal case.

Practical application for the preservation of right to a fair trial is the scale by which reality is weighed. Human experiences and human tendencies bear upon the balance and these we cannot ignore.

Repeating what has already been said, the lawyers on both sides in this criminal proceedings will, as earnestly as they can, represent their respective clients. They will observe technicalities and use them where they can. They will do this not because of any ulterior motive to detract from a fair trial, but they will do this because of their warranted beliefs in their right to pursue the due process accorded to their respective clients.

The remedies available to the parties before any harm is done to either side comes not at the time of trial when prejudice to the defendants and injustice to the public may prevail, but now at the inception when notice of such possibilities and likelihoods are presented in formal manner. I deem the time to act in this connection is now.

For all of these reasons a Decree granting a preliminary injunction has been entered on the 28th day of July 1967. All motions inconsistent with this Decree will be denied.

All findings of fact and conclusions of law are here incorporated as they may be required by law.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1029

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and PHILADELPHIA HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM E. WILLIS, ESQ.
48 Wall Street,
New York, New York 10005
and
HUBERT I. TEITELBAUM, ESQ.
1112 Frick Building,
Pittsburgh, Pa. 15219
Counsel for American Radiator & Standard Sanitary Corporation

Of Counsel,
SULLIVAN & CROMWELL
48 Wall Street,
New York, N. Y. 10005
and
MORRIS, SAFIER AND TEITELBAUM
1112 Frick Building,
Pittsburgh, Pa. 15219

THOMAS F. DALY, ESQ.
25 Broadway,
New York, N. Y. 10004
and
HAROLD R. SCHMIDT, ESQ.
919 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Crane Co.

Of Counsel,
LORD, DAY & LORD
25 Broadway,
New York, N. Y. 10004
and
ROSE, SCHMIDT AND DIXON
919 Oliver Building,
Pittsburgh, Pa. 15222

(Counsel continued on inside cover)

FRANK C. MCALEER, ESQ.
120 S. LaSalle Street,
Chicago, Ill. 60603
and
JAMES A. BELL, ESQ. and
CLYDE W. ARMSTRONG, ESQ.
2900 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Universal-Rundle Corporation

Of Counsel,
ARNSTEIN, GLUCK, WEITZENFELD & MINOW
120 LaSalle Street,
Chicago, Ill. 60603
and
THORP, REED & ARMSTRONG
2900 Grant Building,
Pittsburgh, Pa. 15219

DAVID B. BUERGER, ESQ.
CLAYTON A. SWEENEY, ESQ.
1800 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Borg-Warner Corp.

Of Counsel,
BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER
1800 Oliver Building,
Pittsburgh, Pa. 15222

PAUL J. WINSCHEL, ESQ.
GILBERT J. HELWIG, ESQ.
J. TOMLINSON FORT, ESQ.
747 Union Trust Building,
Pittsburgh, Pa. 15219
Counsel for Kohler Co.

Of Counsel,
REED, SMITH, SHAW & MCCLAY
747 Union Trust Building,
Pittsburgh, Pa. 15219

MILTON HANDLER, ESQ.
425 Park Avenue,
New York, N. Y. 10022
and
D. MALCOLM ANDERSON, ESQ.
1707 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Wallace-Murray Corp. and John B. Balmer.

Of Counsel,
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue,
New York, N. Y. 10022
and
GRIGGS, MORELAND, BLAIR & ANDERSON
1707 Oliver Building,
Pittsburgh, Pa. 15222

RALPH L. MCAFEE, ESQ.
1 Chase Manhattan Plaza,
New York, N. Y. 10005
and
DAVID J. ARMSTRONG, ESQ.
820 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Rheem Manufacturing Co.

Of Counsel,
CRAVATH, SWAINE & MOORE
1 Chase Manhattan Plaza,
New York, N. Y. 10005
and
DICKIE, MCCAMEY & CHILCOTE
820 Grant Building,
Pittsburgh, Pa. 15219

GEORGE A. RAFTERY, ESQ.
152 West 42nd Street,
New York, N. Y. 10036
and
MAURICE WECHSLER, ESQ.
1312 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Briggs Manufacturing Company

Of Counsel,
O'BRIEN, DRISCOLL & RAFTERY
152 West 42nd Street,
New York, N. Y. 10036

T. W. POMEROY, JR., ESQ. and
W. WALTER BRAHAM, JR., ESQ.
1100 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Plumbing Fixture Manufacturers Association

Of Counsel,
KIRKPATRICK, POMEROY, LOCKHART & JOHNSON
1100 Oliver Building,
Pittsburgh, Pa. 15222

ABRAHAM J. HARRIS, ESQ.
888 Seventeenth Street, N.W.,
Washington, D. C. 20006
and
ELLIOTT W. FINKEL, ESQ.
424 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Gerber Plumbing Fixtures Corp.

Of Counsel,
SHER & HARRIS
888 Seventeenth Street, N.W.,
Washington, D. C. 20006
and
KAPLAN, FINKEL & ROTH
424 Frick Building,
Pittsburgh, Pa. 15219

J. KING ROSENDALE, ESQ.
700 Terminal Tower,
Cleveland, Ohio 44113
and
EUGENE B. STRASSBURGER, JR., ESQ.
2602 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Mansfield Sanitary, Inc.

Of Counsel,
McAFEE, HANNING, NEWCOMER, HAZLETT & WHEELER
700 Terminal Tower,
Cleveland, Ohio 44113
and
STRASSBURGER & McKENNA
2602 Grant Building,
Pittsburgh, Pa. 15219

FOSTER T. BEAN, ESQ.
115 S. Martin Street, P.O. Box 1251,
Kilgore, Texas 75662
and
WILLIAM J. KENNEY, ESQ.
Suite 1677, Gateway Two,
Pittsburgh, Pa. 15222
Counsel for Kilgore Ceramics Corp.

Of Counsel,
BEAN, FORD, SCHLEIER & DICKERSON
115 S. Martin Street, P.O. Box 1251
Kilgore, Texas 75662
and
KENNEY, STEVENS, CLARK & SEMPLE
Suite 1677, Gateway Two,
Pittsburgh, Pa. 15222

ISADORE J. FINE, ESQ.
405 Citizens National Bank Building,
Evansville, Indiana 47708
and
HARRY W. MILLER, ESQ.
1212 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Georgia Sanitary Pottery, Inc.

Of Counsel,
FINE, HATFIELD, SPARRENBERGER & FINE
405 Citizens National Bank Building,
Evansville, Indiana 47708
and
ROYSTON, ROBB, LEONARD, EDGECOMBE & MILLER
1212 Frick Building,
Pittsburgh, Pa. 15219

MARK J. MAGED, ESQ.
30 Broad Street,
New York, N. Y. 10004
and
J. VINCENT BURKE, JR., ESQ.
1100 Peoples Bank Bldg.,
Pittsburgh, Pa. 15222
Counsel for Ogden Corporation

Of Counsel,
HOLTZMANN, WISE & SHEPARD
30 Broad Street,
New York, N. Y. 10004
and
CAMPBELL, THOMAS & BURKE
1100 Peoples Bank Building,
Pittsburgh, Pa. 15222

ELVIN H. HEWINS, ESQ.
303 Union Federal Building,
Evansville, Indiana 47708
and
ROBERT E. WAYMAN, ESQ.
920 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Peerless Pottery, Inc.

Of Counsel,
INGLEHART, HEWINS & SONGER
303 Union Federal Building,
Evansville, Indiana 47708
and
WAYMAN, IRVIN, TRUSHEL & MCAULEY
920 Frick Building,
Pittsburgh, Pa. 15219

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IN THE

Supreme Court of the United States

October Term, 1967

No.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and PHILADELPHIA HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 18, 1967.

Citation to Opinions Below

The opinion of the Eastern District of Pennsylvania denying petitioners' motion for a stay of the treble damage actions is printed in Appendix C hereto and is reported at 269 F. Supp. 540. The opinion of the Western District of

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* American Radiator & Standard Sanitary Corporation, Kohler Co., Crane Co., Wallace-Murray Corporation, Universal-Rundle Corporation, Rheem Manufacturing Company, Borg-Warner Corporation, Briggs Manufacturing Company, Plumbing Fixture Manufacturers Association, John B. Balmer, Gerber Plumbing Fixtures Corp., Ogden Corporation, Mansfield Sanitary, Inc., Peerless Pottery, Inc., Kilgore Ceramics Corporation, Lawndale Industries, Inc. and Georgia Sanitary Pottery, Inc.

Pennsylvania granting an injunction to petitioners is printed in Appendix B hereto and is reported at 272 F. Supp. 691. The opinion of the Court of Appeals, which reversed the judgment of the District Court for the Western District of Pennsylvania, is printed in Appendix A hereto and is not yet reported in the official reports but has been reported at 1967 Trade Cas. ¶ 72,311 (3d Cir. Dec. 18, 1967).

Jurisdiction

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on December 18, 1967. The Court of Appeals stayed its mandate for 30 days on January 3, 1968 but refused to stay proceedings in the Eastern District of Pennsylvania. On January 11, 1968, Mr. Justice Brennan denied petitioners' application for a stay of proceedings in the Eastern District of Pennsylvania pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Questions Presented

1. Is it an abuse of discretion for a federal district court, in order to insure a fair criminal trial, to enjoin concurrent discovery proceedings against the criminal defendants in related, subsequently filed, private civil litigation pending in another federal court which had refused to stay such proceedings?

2. Is a federal criminal court powerless to enjoin concurrent discovery proceedings in related civil litigations in another federal court when the defendants have not yet

sought review by peremptory writ of the civil court's denial of a stay, but after the civil court refused to certify its ruling for interlocutory appeal?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the self-incrimination and due process clauses of the fifth amendment to the United States Constitution and the right to counsel clause of the sixth amendment to the United States Constitution. The statute giving the District Court power to issue the injunction is 28 U.S.C. § 1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure. These provisions are printed in Appendix D hereto.

Statement

Petitioners are an individual, corporations and a trade association which have been indicted in the United States District Court for the Western District of Pennsylvania ("Pittsburgh") upon charges of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.* The two indictments were filed October 6, 1966, and all the defendants have pleaded not guilty.**

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* Petitioners have been informed that the remaining individuals indicted in Pittsburgh intend to file a separate petition for a writ of certiorari.

** On the same day the United States instituted a civil action in the Pittsburgh court seeking injunctive relief against the corporate and trade association defendants named in one of the indictments and making virtually identical allegations of illegality. This action has been stayed by order of the Pittsburgh court with the Government's consent.

A. The Philadelphia Civil Actions.

Some two and one-half months after the indictments, the Philadelphia Housing Authority and Lindy Bros. Builders, Inc. of Philadelphia, purporting to represent classes,* filed civil treble-damage actions in the United States District Court for the Eastern District of Pennsylvania ("Philadelphia") pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, against the indicted corporations and trade association ("the civil defendants") alleging, in virtually verbatim language, the same violations of law earlier charged in the Pittsburgh indictments. In January and February 1967 these plaintiffs served extensive interrogatories and a motion for production of a vast quantity of documents which sought information directly relating to the acts alleged in the indictments.

On March 28, 1967, the civil defendants moved in the Eastern District of Pennsylvania for a stay of proceedings in the Philadelphia actions pending the disposition of the criminal cases. This motion was denied by Hon. John W. Lord, Jr. on June 7, 1967, 269 F. Supp. 540. On June 15, 1967, Judge Lord denied the civil defendants' request for certification of an interlocutory appeal pursuant to 28

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* At present, some 475 plaintiffs have already intervened, or moved to intervene, in the Philadelphia civil actions.

In addition to the Philadelphia civil actions, similar actions have been commenced against some or all of the corporations and the trade association in the United States District Courts for the Northern District of California, the District of Columbia and the Western District of Pennsylvania. All pretrial discovery in those cases has either been deferred by agreement of counsel pending final disposition of the instant proceeding or has not yet been instituted.

U.S.C. § 1292(b).* The civil defendants' subsequent request for a protective order barring discovery pending this Court's decision in *Simon* v. *Wharton,* No. 72 October Term 1967, *cert. granted,* 386 U.S. 1030, was also denied.

B. The Pittsburgh Proceedings.

On June 30, 1967, petitioners moved before Hon. Louis Rosenberg, the judge assigned to preside over the Pittsburgh criminal actions, for an injunction barring the Philadelphia plaintiffs from requiring the civil defendants to plead to the Philadelphia complaints or respond to the interrogatories and document production motion. Judge Lord, at Judge Rosenberg's request, thereupon extended the time within which the civil defendants were required to act in the Philadelphia actions, stating that Judge Rosenberg should decide the matter in his own discretion.

On July 28, 1967, Judge Rosenberg found that an injunction was necessary (1) to preserve the constitutional rights of the criminal defendants; (2) to prevent the Government's obtaining an unfair advantage from premature and one-sided disclosure of their positions and defenses during the course of civil discovery; and (3) to insure the fair and orderly administration of the criminal cases. On the other hand, he found that no prejudice to the private plaintiffs would result from the reasonable delay in the prosecution of their damage claims occasioned by the injunction. Accordingly, Judge Rosenberg issued an injunction for 60

* On June 19, 1967, Hon. Alfonzo J. Zirpoli denied without prejudice a motion to stay the treble-damage actions pending in the Northern District of California, stating that the proper forum for relief was the Pittsburgh court in which the criminal cases are pending. (Transcript of Proceedings, June 19, 1967, *Eastland Construction Co.* v. *American Radiator & Standard Sanitary Corp.,* No. 46162 (N.D. Calif.) at p. 15.)

days, unless further extended by order of the Court, prohibiting the private plaintiffs from requiring answers to their complaints or any responses to the pending interrogatories and document production motion; the court also enjoined the criminal defendants from taking any such action or from testifying in any depositions in the Philadelphia actions.

C. Proceedings in the Court of Appeals.

On August 3, 1967, respondent Philadelphia Housing Authority*, acting on behalf of all the Philadelphia plaintiffs, appealed from Judge Rosenberg's injunction. The civil defendants thereupon, on August 18, petitioned the Court of Appeals for a writ of mandamus or prohibition to review Judge Lord's denial of a stay in the Philadelphia civil cases "in order that [the Court of Appeals] might have before it all of the issues necessary for a proper determination of the matter and for the granting of such relief as is required under the circumstances." The Court of Appeals denied this petition without hearing or opinion, but "without prejudice," on September 13, 1967 at a time when the Pittsburgh injunction was in effect.

On September 26, 1967, when Judge Rosenberg's 60-day injunction was about to expire, the Court of Appeals stayed all proceedings in the Philadelphia actions until its determination of the appeal from the injunction and its further order, except that the civil defendants were required to answer the complaints, which they have done.

The Court of Appeals reversed the order of the Pittsburgh District Court and set the injunction aside on Decem-

* Respondent United States took no position in either the Pittsburgh District Court or the Court of Appeals.

ber 18, 1967. Judge William H. Hastie's opinion avoided reaching the merits of the civil defendants' claims to prejudice in their defense of the criminal charges. Rather, it set the injunction aside on the procedural ground that those petitioners (the indicted corporations and trade association) should have sought "an appeal from the court [Philadelphia] which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal [Pittsburgh]." (A-3) With respect to the indicted individuals, the Court of Appeals ruled that their rights could be adequately protected on an *ad hoc* basis by the Philadelphia court in which the civil cases are pending. On January 3, 1968, the Court of Appeals stayed the issuance of its mandate,* but denied petitioners' motion for a stay of the Philadelphia civil proceedings pending the filing of a petition for certiorari and this Court's disposition thereof.

In the meantime, consonant with the Court of Appeals" decision, on December 29, 1967, the civil defendants renewed their mandamus petition (previously denied "without prejudice") seeking review of Judge Lord's denial of a stay. This renewal was, on January 8, 1968, summarily denied, again without hearing or opinion. The civil defendants intend promptly to file with this Court a petition for certiorari to review this ruling so that all of the relevant procedures, records and issues may be before this Court.

The Philadelphia plaintiffs having moved on January 5, 1968 for sanctions, claiming that the civil defendants had defaulted on discovery despite the prior injunction, peti-

* The stay of mandate had no effect inasmuch as the Pittsburgh court's injunction, effective for 60 days, had long since expired.

tioners applied to Mr. Justice Brennan on January 9, 1968 for a stay of the Philadelphia proceedings pending review in this Court. Mr. Justice Brennan denied that application for a stay on January 11, 1968.

Reasons for Granting the Writ

This petition raises substantial and important questions concerning the administration of criminal justice in the federal courts. This Court has not passed upon the rights of criminal defendants to be protected from simultaneous discovery proceedings in parallel private civil actions; upon the power or obligation of a federal criminal court to afford such protection to defendants within its jurisdiction; or upon the proper pre-trial and appellate procedures by which such protection should be accorded. The questions here involved embrace those raised in *United States* v. *Simon*, 262 F. Supp. 64 (S.D.N.Y. 1966), *rev'd*, 373 F.2d 649 (2d Cir. 1967), in which this Court granted certiorari, *sub nom. Simon* v. *Wharton*, 386 U.S. 1030 (1967). Subsequent mootness prevented this Court from passing upon these questions in *Simon*.* Review of those questions is no less appropriate in this case.

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* On December 18, 1967, upon consideration of the parties' joint motion, this Court vacated the judgments below and remanded the case with instructions to dismiss it as moot. 36 U.S.L.W. 3252 (U.S. Dec. 18, 1967). The matter was mooted by the start of the criminal trial and the settlement of the civil action.

To avoid the possibility that these questions similarly might be mooted in the instant case by the commencement of the criminal trial, petitioners will undertake, if this petition is granted, to file immediately motions pursuant to this Court's Rules 41(4) and 43(4) for an advancement of argument and an abridgement of the time for filing briefs on the merits so that these questions may be determined during this term.

I

Petitioners' rights to due process and a fair trial of the criminal charges against them are seriously jeopardized by the spectre of broad civil discovery in private actions involving the identical allegations of illegality. The threat posed by such concurrent proceedings has several facets, all of which were either rejected or ignored by the Court of Appeals.

First, civil discovery prior to the criminal trial would necessarily compel disclosure of the defendants' positions and defenses and thus afford the Government a preview of defendants' case not contemplated by the Federal Rules of Criminal Procedure. Since criminal defendants do not have access to comparable discovery from the Government, the federal criminal courts in both the instant case and *Simon* correctly held that an unfair and prejudicial advantage to the Government would thereby result.

As in *Simon,* where the criminal defendants had declared their intention not to rely upon their privilege against self-incrimination, this element of unfairness transcends the Fifth Amendment privilege. The corporate petitioners here, not having a privilege against self-incrimination, are in the same posture as the *Simon* defendants who were unwilling to invoke it. In light of the hundreds of intervenor-plaintiffs presently prosecuting the Philadelphia actions, any disclosures made in the course of civil discovery are certain to affect the trial of the criminal cases. Adequate safeguards against the unfair use of such information could not be provided by protective orders such as

those contemplated by the Court of Appeals.* The unfairness inherent in such a state of affairs is apparent; and corporate criminal defendants, just as accused individuals, are entitled to due process.

In addition, unlike the situation in *Simon*, civil discovery prior to the criminal trial impairs effective exercise of the individual defendants' Fifth Amendment privilege against self-incrimination. It has long been recognized that failure scrupulously to uphold the privilege in proceedings collateral to a criminal prosecution can destroy it.** Since the individual defendants are present or former employees of the corporate petitioners, civil discovery during the pendency of the criminal cases necessarily spawns a host of Fifth Amendment problems. For example, what are the discovery obligations of the corporate petitioners, as civil defendants, to seek information from the accused individuals, presumably the most knowledgeable parties? To what extent, if at all, must the accused individuals cooperate with the corporations in making discovery on matters as to which the individuals would prefer to remain silent pending trial? On the other hand, what would be the effect

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* That the Court of Appeals was mistaken in assuming that adequate protection will be provided by the civil district court is evidenced by Judge Lord's denial, on July 12, 1967, of a motion by petitioner, Wallace-Murray Corporation (whose president and chief executive officer, John B. Balmer, is one of the indicted individuals) seeking relief from the obligation to respond to so much of the requested discovery as concerns the specific criminal charges, as distinguished from background and economic facts. The Court of Appeals denied a petition for a writ of mandamus seeking review of Judge Lord's order on September 13, 1967.

** "[I]f the privilege is to be effective at all it must be given a comprehensive application, and thus must prevent compulsory self-incrimination in *any* proceeding." GRISWOLD, THE 5TH AMENDMENT TODAY 55 (1955).

on the individuals' constitutional rights if the corporations respond to discovery requests by providing information with respect to the individuals' activities against their wishes? In short, how could discovery be meaningful, accurate or complete without impairing the individuals' Fifth Amendment rights? Furthermore, with the pendency of the criminal cases, any exercise of the Fifth Amendment privilege, were it to receive publicity, could well be prejudicial in itself. So also, all defendants could be injured by public disclosures resulting from civil discovery.

The simultaneous prosecution of the criminal cases and civil discovery would also place an unnecessary and oppressive burden on both the criminal and civil courts. The impact of each item of civil discovery upon the criminal trial and the rights of the criminal defendants, the manner in which it should be handled, the scope, nature and degree of disclosure, and like problems are the proper concern not only of the civil court but of the criminal court as well, which "must take such steps by rule and regulation that will protect [its] processes from prejudicial outside interferences." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966); *see also, Estes* v. *Texas*, 381 U.S. 532 (1965). These questions, which transcend the normal functioning of the Federal Rules of Civil Procedure, would require pioneer rulings every step of the way by the courts with responsibility for both the civil and criminal cases.

Moreover, the burden of active, simultaneous preparation and defense of the criminal and civil cases imperils the defendants' rights to fundamental fairness and the effective assistance of counsel. The harassment inherent in requiring defendants to wage a two-front war is self-

evident. Since no discovery could be made in the civil cases without having to evaluate its impact on the criminal defense, the same counsel must know and function in order to protect the defendants' rights in both cases. And they must participate as advocates in fashioning the pioneer rulings which will be necessitated. This burden, substantial as it is for the corporate defendants, simply cannot be sustained by the individuals, a number of whom are no longer employed by the corporate defendants and most of whom have retained separate counsel.

The foregoing burdens and problems, in addition, run counter to the statutory scheme embodied in Section 5 of the Clayton Act, 15 U.S.C. §§ 16(a), 16(b), which provides prospective civil plaintiffs with incentives to abide the result of government litigation. The clear congressional plan is that, if the Government is the initiator of action aimed at vindicating the public interest, private parties should await the disclosures and outcome of the government suit.

The Court of Appeals, considering the individual defendants' contentions, brushed aside the problems, the burdens and the statutory scheme. With respect to civil discovery against their corporate employers impairing their Fifth Amendment privilege and disadvantaging them at trial, the Court held:

> "[W]e know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him." (A-5)

Moreover, the Court of Appeals ignored the controlling considerations in reconciling discovery in concurrent civil

and criminal litigation as aptly stated by the Fifth Circuit in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963):

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.
>
> " . . . Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. . . ." (307 F.2d at 487)* (A-6 n.1)

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* The district courts have also held that civil discovery should not ordinarily go forward against the prosecution or defendant in a criminal case when both cases involve the same issues. *United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955); *United States* v. *Bridges*, 86 F.Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *Zara Contracting Co.* v. *New York*, 22 App. Div. 2d 415, 256 N.Y.S. 2d 98 (3d Dept. 1965); *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *see also, Texaco, Inc.* v. *Borda*, 383 F.2d 607 (3d Cir. 1967) (therein the court below affirmed a stay of virtually all civil proceedings pending disposition of related criminal proceedings); *cf. United States* v. *Parrott*, 248 F.Supp. 196 (D.D.C. 1965); *but see, Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948).

Although the Fifth Circuit did not have before it an injunction issued by the District Court, its views of the governing principles find no reflection in the Third Circuit's decision which failed even to consider the merits of the corporate petitioners' claims of prejudice. Judge Hastie unsuccessfully attempted to distinguish *Campbell* by stating that the instant case "is quite unlike the situation in which a party to a criminal prosecution is demanding discovery in a civil suit as a means of obtaining advance disclosure of what the other side will be able to prove in the criminal case. Contrast Campbell v. Eastland, 5th Cir. 1962, 307 F.2d 478." (A-6 n.1) Petitioners respectfully submit that, just because the shoe is on the other foot the principles do not differ; accordingly, the Court of Appeals' decision conflicts with that of the Fifth Circuit.

Here, without any showing of prejudice to the private plaintiffs, the Court of Appeals placed a higher value on immediate prosecution of their damage claims than on preserving the integrity of the criminal trial and avoiding the manifest burdens and complications of concurrent proceedings. The need for this Court to enunciate the standards and principles governing the administration of these difficult problems is plain.* See Note, *Concurrent Civil and Criminal Proceedings,* 67 Colum. L. Rev. 1277, 1294 (1967).

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* The instant case and *Simon* v. *Wharton, supra,* are illustrative of the myriad situations in which the threat to the fair administration of federal criminal justice posed by concurrent criminal and civil actions can arise. Not only may virtually every crime give rise to common-law civil liability, but Congress has specifically accorded a concomitant right to civil damages in numerous federal criminal statutes. *E.g.,* 15 U.S.C. §§ 78ff, 77k (Securities); 18 U.S.C. § 1001, 15 U.S.C. § 1120 (fraudulent trademark registrations).

II

In holding that the criminal court was powerless to enjoin discovery proceedings against the civil defendants, the Court of Appeals conflicts with the decision of the Second Circuit in *United States* v. *Simon*, 373 F. 2d 649 (2d Cir. 1966), *rev'g*, 262 F. Supp. 64 (S.D.N.Y. 1967), *cert. granted*, 386 U.S. 1030 (1967), *vacated as moot*, 36 U.S.L.W. 3252 (U.S. Dec. 18, 1967).

The Third Circuit held that the appropriate procedure was "an appeal from the court which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal." (A-3) In so ruling, the Court of Appeals made no mention of these crucial facts: (1) the civil defendants initially sought direct interlocutory appeal from Judge Lord's denial of a stay and were refused the requisite certification, direct appeal under 28 U.S.C. § 1292(a) being unavailable (see *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955); *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966)); (2) the Third Circuit's receptivity to mandamus as an appropriate remedy to review the grant or denial of a stay was in doubt and not clarified until the later decision in *Texaco, Inc.* v. *Borda*, 383 F. 2d 607 (3d Cir. 1967), on July 17, 1967;* (3) this Court's grant of certiorari in *Simon* v. *Wharton*, effectively continuing an injunction issued by the criminal court after

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* *Borda* demonstrates an uneven-sense of justice in the Third Circuit's ruling in the instant case. In *Borda* it upheld a district court's stay in a private antitrust action of discovery proceedings against corporate defendants, most of which were under indictment, against a mandamus attack by a non-indicted defendant. On the contrary, here the Court of Appeals' action disavows a stay.

it was empowered to do so by Mr. Justice Harlan's order, suggested that such a procedure was appropriate; (4) Judge Zirpoli, in the California civil cases, had suggested that the Pittsburgh criminal court was the proper forum in which to seek relief; (5) Judge Lord indicated that the procedure adopted was not unacceptable to him, postponing proceedings to permit Judge Rosenberg to rule and stating that the criminal court should decide the matter in its own discretion; and (6) after an appeal from the Pittsburgh criminal court injunction was taken, the civil defendants sought mandamus to provide the Court of Appeals with the opportunity to rule on all the prior procedures. Instead, the Third Circuit summarily denied the mandamus petition (and a subsequent renewal thereof), and then reversed the injunction holding, inexplicably, that mandamus should have been sought.

The Third Circuit's rigid approach to a noval procedural problem is in sharp contrast to that of the Second Circuit in *Simon*. There, the civil plaintiff noticed the deposition of an indicted individual not a party to the civil action. The accused moved in the civil case for a protective order. Upon denial of that motion, his appeal to the Second Circuit was dismissed summarily without opinion, presumably because the order was not appealable except by peremptory writ. The witness, and the other criminal defendants, thereupon sought and were granted an injunction by the criminal court sitting in another district. On appeal from the injunction, the Second Circuit reviewed the merits, specifically assumed the criminal court's power to issue the injunction and in no way suggested that a failure to seek mandamus from the civil court's denial of relief made the criminal injunction improper.

What the Third Circuit presumably has said is that (a) it will review the grant or denial of a stay in a civil case by peremptory writ (although it has declined twice to do so here) and (b) that because the district judges presiding over criminal cases in the Circuit may not enjoin concurrent civil proceedings before such review, they can never do so since the Court of Appeals will have resolved the matter before they are at liberty to act. It shifts from the court having jurisdiction of the criminal case to the court handling the civil case the paramount responsibility of insuring a fair criminal trial. The enunciation of this unpredictable procedure has been invoked to deprive the corporate petitioners of consideration of the merits of their claims to imminent infringement of their substantial rights to due process and a fair criminal trial. This ruling, directly contrary to the procedure accepted by the Second Circuit in *Simon*, should be reviewed by this Court to clarify the respective roles of the federal civil, criminal and appellate tribunals in protecting the substantial rights of criminal defendants against the threat of civil discovery.

III

Due process requires fundamental fairness. *In re Murchison*, 349 U.S. 133 (1955). And the fair application of the Criminal Rules is the obligation of the district courts. *McNabb* v. *United States*, 318 U.S. 332 (1943). As this Court held in *Estes* v. *Texas*, 381 U.S. 532 (1965), where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting.

The Pittsburgh district court, finding a "duty . . . to protect the accused in a criminal case," (B-23) reviewed all of the relevant facts and carefully weighed the likelihood of substantial injury to the integrity and fairness of the criminal cases against any conceivable prejudice to the civil plaintiffs by a reasonable delay in the prosecution of their damage claims. Judge Rosenberg concluded that the scales weighed overwhelmingly in petitioners' favor:

> "[W]hile recognizing that the plaintiffs are entitled to speedy availability of discovery processes of persons and records, the delay by the granting of a preliminary injunction will not unduly cause the plaintiffs irreparable harm against the possible irreparable harm to the defendants. In fact, by a speedier disposition of the criminal actions now pending before me, the plaintiffs are likely to acquire greater benefits from records divulged in the criminal proceedings under 15 U.S.C. § 16(a) . . . . I can see no prejudicial results to the plaintiffs while here protecting the fundamental rights of the defendants in the pending criminal actions." (B-20-1, 22)

This ruling reflects the proper standard governing the harmonization of concurrent civil and criminal proceedings in the federal courts. Since the Court of Appeals has repudiated that standard, we submit that this Court in the exercise of its supervisory powers over the federal judiciary should grant certiorari to settle important questions in the administration of criminal justice.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

WILLIAM E. WILLIS, ESQ.
48 Wall Street,
New York, New York 10005
and
HUBERT I. TEITELBAUM, ESQ.
1112 Frick Building,
Pittsburgh, Pa. 15219
Counsel for American Radiator & Standard Sanitary Corporation

Of Counsel,
SULLIVAN & CROMWELL
48 Wall Street,
New York, N. Y. 10005
and
MORRIS, SAFIER AND TEITELBAUM
1112 Frick Building,
Pittsburgh, Pa. 15219

THOMAS F. DALY, ESQ.
25 Broadway,
New York, N. Y. 10004
and
HAROLD R. SCHMIDT, ESQ.
919 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Crane Co.

Of Counsel,
LORD, DAY & LORD
25 Broadway,
New York, N. Y. 10004
and
ROSE, SCHMIDT AND DIXON
919 Oliver Building,
Pittsburgh, Pa. 15222

FRANK C. MCALEER, ESQ.
120 S. LaSalle Street,
Chicago, Ill. 60603
and
JAMES A. BELL, ESQ. and
CLYDE W. ARMSTRONG, ESQ.
2900 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Universal-Rundle Corporation

Of Counsel,
ARNSTEIN, GLUCK, WEITZENFELD & MINOW
120 LaSalle Street,
Chicago, Ill. 60603
and
THORP, REED & ARMSTRONG
2900 Grant Building,
Pittsburgh, Pa. 15219

DAVID B. BUERGER, ESQ.
CLAYTON A. SWEENEY, ESQ.
1800 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Borg-Warner Corp.

Of Counsel,
BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER
1800 Oliver Building,
Pittsburgh, Pa. 15222

PAUL J. WINSCHEL, ESQ.
GILBERT J. HELWIG, ESQ.
J. TOMLINSON FORT, ESQ.
747 Union Trust Building,
Pittsburgh, Pa. 15219
Counsel for Kohler Co.

Of Counsel,
REED, SMITH, SHAW & MCCLAY
747 Union Trust Building,
Pittsburgh, Pa. 15219

MILTON HANDLER, ESQ.
425 Park Avenue,
New York, N. Y. 10022
and
D. MALCOLM ANDERSON, ESQ.
1707 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Wallace-Murray Corp. and John B. Balmer

Of Counsel,
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue,
New York, N. Y. 10022
and
GRIGGS, MORELAND, BLAIR & ANDERSON
1707 Oliver Building,
Pittsburgh, Pa. 15222

RALPH L. MCAFEE, ESQ.
1 Chase Manhattan Plaza,
New York, N. Y. 10005
and
DAVID J. ARMSTRONG, ESQ.
820 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Rheem Manufacturing Co.

Of Counsel,
CRAVATH, SWAINE & MOORE
1 Chase Manhattan Plaza,
New York, N. Y. 10005
and
DICKIE, MCCAMEY & CHILCOTE
820 Grant Building,
Pittsburgh, Pa. 15219

GEORGE A. RAFTERY, ESQ.
152 West 42nd Street,
New York, N. Y. 10036
and
MAURICE WECHSLER, ESQ.
1312 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Briggs Manufacturing Company

Of Counsel,
O'BRIEN, DRISCOLL & RAFTERY
152 West 42nd Street,
New York, N. Y. 10036

T. W. POMEROY, JR., ESQ. and
W. WALTER BRAHAM, JR., ESQ.
1100 Oliver Building,
Pittsburgh, Pa. 15222
Counsel for Plumbing Fixture Manufacturers Association

Of Counsel,
KIRKPATRICK, POMEROY, LOCKHART & JOHNSON
1100 Oliver Building,
Pittsburgh, Pa. 15222

ABRAHAM J. HARRIS, ESQ.
888 Seventeenth Street, N.W.,
Washington, D. C. 20006
and
ELLIOTT W. FINKEL, ESQ.
424 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Gerber Plumbing Fixtures Corp.

Of Counsel,
SHER & HARRIS
888 Seventeenth Street, N.W.,
Washington, D. C. 20006
and
KAPLAN, FINKEL & ROTH
424 Frick Building,
Pittsburgh, Pa. 15219

J. KING ROSENDALE, ESQ.
700 Terminal Tower,
Cleveland, Ohio 44113
and
EUGENE B. STRASSBURGER, JR., ESQ.
2602 Grant Building,
Pittsburgh, Pa. 15219
Counsel for Mansfield Sanitary, Inc.

Of Counsel,
McAFEE, HANNING, NEWCOMER, HAZLETT
& WHEELER
700 Terminal Tower,
Cleveland, Ohio 44113
and
STRASSBURGER & McKENNA
2602 Grant Building,
Pittsburgh, Pa. 15219

FOSTER T. BEAN, ESQ.
115 S. Martin Street, P.O. Box 1251,
Kilgore, Texas 75662
and
WILLIAM J. KENNEY, ESQ.
Suite 1677, Gateway Two,
Pittsburgh, Pa. 15222
Counsel for Kilgore Ceramics Corp.

Of Counsel,
BEAN, FORD, SCHLEIER & DICKERSON
115 S. Martin Street, P.O. Box 1251,
Kilgore, Texas 75662
and
KENNEY, STEVENS, CLARK & SEMPLE
Suite 1677, Gateway Two,
Pittsburgh, Pa. 15222

ISADORE J. FINE, ESQ.
405 Citizens National Bank Building,
Evansville, Indiana 47708
and
HARRY W. MILLER, ESQ.
1212 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Georgia Sanitary Pottery, Inc.

Of Counsel,
FINE, HATFIELD, SPARRENBERGER & FINE
405 Citizens National Bank Building,
Evansville, Indiana 47708
and
ROYSTON, ROBB, LEONARD, EDGECOMBE & MILLER
1212 Frick Building,
Pittsburgh, Pa. 15219

MARK J. MAGED, ESQ.
30 Broad Street,
New York, N. Y. 10004
and
J. VINCENT BURKE, JR., ESQ.
1100 Peoples Bank Bldg.,
Pittsburgh, Pa. 15222
Counsel for Ogden Corporation

Of Counsel,
HOLTZMANN, WISE & SHEPARD
30 Broad Street,
New York, N. Y. 10004
and
CAMPBELL, THOMAS & BURKE
1100 Peoples Bank Building,
Pittsburgh, Pa. 15222

ELVIN H. HEWINS, ESQ.
303 Union Federal Building,
Evansville, Indiana 47708
and
ROBERT E. WAYMAN, ESQ.
920 Frick Building,
Pittsburgh, Pa. 15219
Counsel for Peerless Pottery, Inc.

Of Counsel,
INGLEHART, HEWINS & SONGER
303 Union Federal Building,
Evansville, Indiana 47708
and
WAYMAN, IRVIN, TRUSHEL & MCAULEY
920 Frick Building,
Pittsburgh, Pa. 15219

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16764 and 16765

Argued September 25, 1967 Decided December 18, 1967

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, *et al.,*

Defendants-Appellees,

and

PHILADELPHIA HOUSING AUTHORITY (Intervenor),

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Before: MCLAUGHLIN, HASTIE and FORMAN, Circuit Judges.

By HASTIE, Circuit Judge: This appeal has been taken from an order entered in two criminal antitrust cases in the District Court for the Western District of Pennsylvania temporarily restraining any further proceedings in certain civil antitrust suits that are pending in the Eastern District of Pennsylvania.

The criminal prosecutions and the civil suits arose out of the same alleged violations of the antitrust laws. The defendants in the civil actions are corporations that are engaged in the manufacture of plumbing fixtures and their trade association. These same corporate defendants and individual corporate officers are the defendants in the criminal prosecution. The indictments were returned October 6, 1966 and the civil actions were filed December 2, 1966.

In the Eastern District civil suit, after interrogatories and a motion to produce documents had been served, the defendant corporations moved to stay all proceedings until the termination of the Western District criminal actions. This motion was denied. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*

Thereafter, in the Western District criminal actions, the corporations, which were defendants in both actions, joined with the corporate officers, who were defendants in the criminal actions only, in the present motion to restrain further proceedings in the civil actions. In addition, the individual criminal defendants asked the court to enjoin them and their corporate codefendants from taking any responsive steps in the civil actions. The court then both temporarily enjoined the civil plaintiffs from requiring answers, discovery or the production of documents and temporarily enjoined the criminal defendants, corporate and individual, from responding to pleadings, interrogatories or motions to produce documents in the civil cases. This appeal by Philadelphia Housing Authority, a plaintiff in one civil action and one of the enjoined parties, testing the injunction for all, followed.

In this case the District Court for the Western District of Pennsylvania has interrupted and enjoined the normal course of procedure in a case pending in the coordinate District Court for the Eastern District of Pennsylvania after the latter court had considered and denied a request for substantially the same interim relief. Within a single circuit where decisions of all district courts are reviewed by a single court of appeals, there is rarely need or justification for action by one district court interfering with the course of litigation pending in another. And certainly, if the injunctive relief sought in the sister court had been requested by the aggrieved parties and denied in the court whose proceedings are sought to be restrained, the sister court should hold its hand. *Cf. Hilton Hotels Corp.* v. *Weaver, D. C. Cir.*, 1963, 325 F. 2d 1010; *Trees* v. *Glenn*, 1935, 319 Pa. 487, 181 Atl. 579. The proper and orderly procedure, which the aggrieved corporations avoided in this case, is an appeal from the court which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal.

In this way the unnecessary appearance of unseemly conflict between coordinate courts in a single circuit is avoided. Moreover, judicial time is conserved and unnecessary expense is avoided by going directly to the appellate court after the first adverse ruling, rather than seeking a conflicting trial ruling elsewhere with the prospect that in any event the matter in dispute will then be appealed. "The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. . . . Courts

already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties." *Crosley Corp.* v. *Hazeltine Corp.*, 3d Cir., 1941, 122 F. 2d 925, 930.

In addition to the arguments made by all of the criminal defendants, the individual corporate officers urge that their claim to injunctive relief is supported by compelling special considerations. These individuals were not parties to the civil actions or to the unsuccessful motions made therein for stays of proceedings. Thus, the motions made in the criminal action were their first request for relief. Moreover, unlike their corporate codefendants, they have a constitutional privilege against self-incrimination. They express apprehension that this privilege may be violated by discovery in the civil suit. And even if damaging disclosures in the civil case should not involve any violation of this constitutional right, they contend that the publication of disclosures required by the corporations concerning internal transactions involving the indicted corporate officers is likely to subject the individuals as well as the corporations to unfair prejudice at the criminal trial.

The claim of deprivation of constitutional right is not well taken. Admittedly, no effort has been made to take the depositions of the individual criminal defendants, nor is there reason to anticipate any such effort. And should any such effort be made the court in the civil action and, if necessary, this court can be relied upon to protect the constitutional right.

The other claims of the individual defendants are more substantial. They cannot be faulted for not seeking relief

in the civil actions where they were not parties. Thus they, different from the corporate defendants, were entitled to have the merits of their claims adjudicated on first presentation in the criminal actions.

On the merits, we know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him. See *United States* v. *Simon*, S. D. N. Y. 1966, 262 F. Supp. 64, 78, *rev'd on other grounds*, 2d Cir. 1967, 373 F. 2d 649. However, we recognize that widespread publication of such evidence in advance of the criminal trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant. Here again, we think the civil court, if alerted to any such danger as presented by a particular demand for information, can, adequately protect the individual defendants against it. Indeed, in denying the motion to stay proceeding the court in the civil action said:

> "If, in the future, the criminal action approaches an involved stage and the plaintiff's discovery, pending at that time, reaches such proportions as to seriously interfere with the defense of the criminal actions, application can readily be made to this court for appropriate relief, such as a short term protective order."

Moreover, disclosures which may indicate the complicity of the defendants, individual or corporate, in the crime charged need not be made available to the media of public information. Indeed, only the civil judge and the civil

plaintiffs' counsel need know what is disclosed, and counsel can be expressly enjoined from sharing the information with other persons pending the criminal trial.[1] Of course, the actual trial of the civil case can and should be postponed until after the criminal trial if it appears that the proof of the plaintiffs' case in open court may result in publicity hurtful to the criminal defendants.

We emphasize that the district court before which the civil antitrust suits are pending has not closed the door to any objections the criminal defendants may make to the answering of particular interrogatories or the production of particular documents. If they can show that a response to a particular demand in the civil suit is likely to injure them unfairly in the criminal actions, they are free to do so. The trial court has done no more than to reject blanket claims that procedurally the civil suits should remain at standstill and that no discovery whatever should be permitted until the criminal actions shall terminate.

We find it unnecessary to consider the appellant's contentions that the court below did not acquire personal jurisdiction over it. Neither is it necessary to decide whether any case or controversy was presented by the ingenious request of the individual defendants that they themselves and their cooperating codefendants be restrained from taking the very steps which they wish to avoid.

The judgment of the district court will be reversed and its injunction set aside.

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[1] This is quite unlike the situation in which a party to a criminal prosecution is demanding discovery in a civil suit as a means of obtaining advance disclosure of what the other side will be able to prove in the criminal case. Contrast *Campbell v. Eastland*, 5th Cir., 1961, 307 F. 2d 478.

APPENDIX B

OPINION OF DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX B

Opinion of United States District Court dated August 9, 1967

UNITED STATES DISTRICT COURT

W. D. PENNSYLVANIA

Crim. Nos. 66-295, 66-296

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.,

UNITED STATES OF AMERICA

v.

PLUMBING FIXTURE MANUFACTURERS ASSOCIATION, et al.

Aug. 9, 1967

ROSENBERG, District Judge.

This follows the decree for a preliminary injunction entered on July 28, 1967. This matter is here on four motions. The first motion was filed by the defendants in the two above entitled criminal actions to restrain and enjoin certain plaintiffs and party intervenors in civil actions, filed in the United States District Court for the Eastern District of Pennsylvania, from compelling the criminal

defendants to file answers to the civil complaints and respond to discovery, particularly to interrogatories as filed in the civil actions.

The second motion was filed by counsel for some of the plaintiffs and party intervenors in the Philadelphia actions to dismiss the first motion as here filed by the defendants. The third motion, also a motion for injunction, was filed after the argument was had on the first two motions, by counsel for all the individual defendants in one of the criminal cases, to enjoin the corporate and co-defendants in the criminal cases and their agents from filing answers to complaints in Philadelphia and from otherwise divulging any matters in such civil proceedings, which matters may be relevant in the two pending criminal cases. A petition for leave to intervene was then filed by the plaintiff Philadelphia Housing Authority and a motion to dismiss the individual defendants' motion for injunction was also filed. The defendants objected to this petition at this point because the plaintiffs had already been served on the first motion for injunction.

I shall here identify the first motion as the (criminal) defendants' motion, as it comes from all the defendants in the two pending criminal actions in the Western District Court; the second motion as the (civil) plaintiffs' motion, as it comes from the party plaintiffs and intervenors in the Eastern District Court of Pennsylvania; the third motion as the individual (criminal) defendants' motion; and the fourth pleading as the plaintiffs' petition and motion.

The facts in this case are simple. After an extensive grand jury investigation into activities of plumbing manufacturers throughout the United States, a grand jury at

Pittsburgh, Pennsylvania, on October 6, 1966, presented two indictments, charging antitrust violations, against the defendants named in the two criminal actions. These are numbered 66—295 and 66—296. On the same date the United States also filed a civil action at No. 66—1184 in the District Court for the Western District of Pennsylvania, charging antitrust violations and seeking injunctive relief.

The first indictment at Criminal No. 66—295 charges eight corporate defendants, a trade association and eight individual defendants, with engaging in a conspiracy, in violation of Section 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act. The indictment charges, in substance, that the defendants conspired to fix the prices of enameled cast iron and vitreous china plumbing fixtures beginning sometime in September 1962 and continuing at least until sometime in 1966.

The second indictment at Criminal No. 66—296 charges ten corporate defendants and their trade association with engaging in a conspiracy in violation of Section 1 of the Sherman Act, in that such defendants conspired to fix the prices of staple vitreous and china plumbing fixtures beginning in November 1960 and continuing to June 1962.

On November 15, 1966, at the arraignment, all the defendants pleaded not guilty. Appearances of counsel had previously been entered for all the defendants. On November 3, 1966, an order was entered on agreement of all counsel to hold Civil Action No. 66—1184 in abeyance and to continue the same until further order of court.

A number of conferences were held by counsel and orders were made relating to the procedure to be followed. The defendants then filed joint motions to dismiss the indictments and to suppress evidence, and motions for pretrial. Four

separate motions to dismiss were also filed by three individual defendants and one corporate defendant. The defendants sought *en camera* proceedings in the hearings on evidence on their motions to suppress the evidence. On May 10, 1967, an order was entered providing for *en camera* argument to determine the necessity for *en camera* hearing of testimony on the motions to suppress. At the argument counsel for the Government and the defendants were directed to file affidavits, which each side eventually did. Determination on this matter is in the process of completion and will be filed shortly.

In the meantime, on December 21, 1966, in the District Court for the Eastern District of Pennsylvania, certain plaintiffs filed two civil actions at Nos. 41773 and 41774, based upon the indictments as found at Criminal Nos. 66—295 and 66—296 in this District, claiming treble damages against all corporate defendants.

In the first numbered case the action was brought by the Philadelphia Housing Authority as a class action in behalf of "all state and municipal governments, governmental agencies, authorities and subdivisions which build or renovate homes and apartment dwellings * * *." In this proceeding the States of Alaska and Michigan and various municipal and political governments and subdivisions or their authorities proceeded to become party intervenors.

The second numbered action was filed by Lindy Bros., Inc. of Philadelphia as a class action on behalf of "approximately 16,000 builders of home and apartment dwellings throughout the United States * * *."

The record before me indicates that forty-nine parties have sought to become intervenors. Both civil actions in the Eastern District Court were assigned as protracted

cases to Judge John W. Lord, Jr. A series of motions and a number of hearings were had before Judge Lord as they related to continuances or postponements by the defendants for the filing of answers to the complaints in these civil actions and to postponing or continuing of the time for the filing of answers to the plaintiffs' interrogatories or other discovery processes.

A number of postponements were granted and Judge Lord, at my request, allowed still further time after the motion for injunction was filed here so that I could hear the parties and inquire into the voluminous pleadings and affidavits and briefs that had been presented to me during the time when I was away from my duties.

Prior to these postponements, Judge Lord had, after filing a comprehensive Memorandum and Order, stated that the plaintiffs in the civil actions had certain rights which should not be prejudiced by any delaying actions of the defendants, and that the requirement for the defendants to answer the complaints and interrogatories did in nowise prejudice the defendants because protective rights would be available to them during the actual discovery processes. On June 7, 1967, he denied the defendants' motions for a stay of all proceedings. Since Judge Lord's continuance protected the defendants until July 31, 1967, an argument on the first two motions was ordered by me to be held July 24th.

On June 30, 1967, all the defendants in both criminal actions filed a motion for injunction at Pittsburgh seeking to enjoin and restrain the plaintiffs and party intervenors in the civil actions at Philadelphia from compelling them as defendants in the civil actions to file answers either to the complaints or interrogatories, based upon practically the

same reasons as were urged before Judge Lord. Immediately thereafter, counsel for the plaintiffs and party intervenors filed a motion to dismiss the defendants' motion, for the reasons (1) that service upon the lawyers of record was not service upon the parties; (2) that in any event it was not service upon all the defendants and intervenors; (3) that the Western District Court, being a court of concurrent jurisdiction could not oust the District Court for the Eastern District of Pennsylvania from its jurisdiction previously acquired; and (4) that the determination by Judge Lord being one based upon his discretionary power was in all events valid and the law of the case.

At the July 24th hearing,[1] all arguments on the first two motions were heard. Counsel for the plaintiffs in the second motion were first heard on the question of jurisdiction, as they had indicated their desire to be heard, without submitting to the jurisdiction of this court.

The defendants argued that Federal Rules of Criminal Procedure Nos. 4(c) (2),[2] 17(e) (1),[3] 49(b),[4] and 57(b),[5]

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1. The United States Attorney was present at this and the second hearing or argument, but took no part either way.
2. 4(c) (2). Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.
3. 17(e) (1). Place of Service.
   (1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.
4. 49(b) Service: How made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.
5. 57(b) Procedure not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

vest every federal district court in criminal actions with power to protect and extend its jurisdiction throughout the United States, and that another source of power is the historic All Writs Act, 28 U.S.C. § 1651.[6] Their basic argument for relief was that they would be unduly burdened in being compelled to present a defense to the civil actions in Philadelphia, particularly as it related to the multitudinous and burdensome discovery there, while at the same time they were required to prepare their defenses to the criminal actions at Pittsburgh; and that they would be deprived of due process of law by a fair trial in these criminal proceedings, and be unduly prejudiced if they were compelled to present evidence against themselves or against the other co-defendants, if so compelled to do in the Philadelphia civil proceedings.

During the argument counsel for the individual defendants (Criminal No. 66—295) suggested his likely intention of further protecting these individual defendants by a motion to enjoin the co-defendants from proceeding with discovery or pleading in civil actions at Philadelphia or elsewhere. This was filed on July 25th, and a hearing was set for July 28th. Argument was had, and the contentions of the movant individual defendants were essentially the same as those presented for the earlier motion for injunction. The individual defendants argued that any information which might be divulged by the officers of the co-defendant corporations would also prove prejudicial to their rights as defendants in the criminal case.

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6. § 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The plaintiffs' counsel, who appeared on July 24th, Mr. David Berger and Mr. Aaron Fine, also appeared at the July 28th hearing and argued against the motions. At the same time, Mr. Fine presented a petition for intervention and a motion for the dismissal of the individual defendants' motion for injunctive relief on the ground that the motion presented no controversy within the requirement of Article III, Section 2 of the Constitution of the United States because no adversary issue was presented between the individual defendants as movants and the co-defendants whom they sought to enjoin and that, therefore, the motion was collusive.

The first questions here then are (1) Do district courts have, under such circumstances as are here presented, jurisdiction to grant remedial aid to criminal defendants? If the answer to the above is "yes", then (2) What method is available for making service upon the necessary parties required to be enjoined?

Both parties in their briefs and at the argument on July 24th referred to United States v. Simon, 262 F.Supp. 64 (S.D.N.Y., 1966), 373 F.2d 649, C.A. 2, 1967, cert. granted, sub. nom. Simon v. Wharton, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967). Each side has presented it as supporting the contentions of that side. The defendants point to it as authority for present jurisdiction here and as precedent for the granting of injunctive relief to threatened defendants charged with crime. The plaintiffs point to the reversal by the Court of Appeals for the Second Circuit of the District Court's order restraining the plaintiffs in the civil action in another district, as disputing the defendants' contentions to any right of relief here.

Appendix B—Opinion of United States District Court dated August 9, 1967

Certain defendants in the *Simon* case, supra, who were charged in the District Court for the Southern District of New York with conspiracy to commit mail fraud and to make false statements in violation of the Securities Exchange Act, applied for an order enjoining the trustee in reorganization in the Eastern District Court pending trial of the criminal action, from taking their depositions and the depositions of other partners and employees of the firm which was charged civilly as a co-conspirator in the civil actions in the Eastern District.

The *Simon* case, supra, is not completely parallel with our action here. In *Simon* the criminal action was commenced subsequent to the filing of the civil action and after discovery had been in progress a year. Here the civil actions at Philadelphia are based on the allegations in the criminal indictments in Pittsburgh and were commenced after criminal prosecutions had started.

In *Simon,* the individual defendants declared that they were waiving constitutional privileges against self-incrimination because the claim of that privilege would damage the high reputations they held as public accountants. Here no such waiver exists, nor can any be demanded by the Government nor by me nor by anyone else. As such, the criminal defendants' rights may not be violated and must remain inviolate until the prosecution shall have presented evidence beyond a reasonable doubt in the criminal cases to support the charges as contained in the indictments and shall have met its burden as required by due process of law.

In *Simon,* the Court of Appeals for the Second Circuit reversed the District Court and indicated that because no

constitutional privileges were involved, the District Court had no basis for injunctive relief. Following that, application was made to Mr. Justice Harlan, assigned to that Circuit, for a stay of the Court of Appeal's mandate and for a continuance of the injunction order as entered by the District Court, pending a certiorari application to the Supreme Court. Mr. Justice Harlan allowed the stay and issued the following Memorandum:

> "Having considered the papers on both sides, I cannot regard the issue sought to be reviewed as insubstantial. I am also of the opinion, however, that continuance of the District Court's injunction order presently expiring by its own terms on March 16, 1967, is best left to that court.
>
> Accordingly, I dispose of this application as follows. I deny the application for a continuance of the District Court's injunction order pending certiorari, without prejudice to the petitioners promptly applying to the District Court for such a continuance. I stay the execution and enforcement of the judgment entered pursuant to the mandate of the Court of Appeals pending this Court's disposition of and determination upon the petition for certiorari, on condition however that such petition is filed on or before March 23, 1967."

When the District Court was petitioned, Judge Bryan ordered the continuance of the injunction stating,

> "Taking all the facts and circumstances into account, I conclude that there is reasonable probability that if the injunction order expiring March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal

> justice and the rules governing it. In my view the prejudice to the defendants were the injunction order not so continued substantially outbalances any prejudice to the Trustee and the interest he represents."

Certiorari was thereafter granted by the Supreme Court (386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967).

Since the granting of certiorari and the (in any event, temporary) setting aside of the Second Circuit's reversal, I have here now reliable authority by which I may be guided (at least until the Supreme Court finally indicates guidance) by Judge Bryan's determination as a precedent for the granting here of protective relief for the defendants charged in the criminal indictments. I, therefore, hold that this District Court has jurisdiction of the subject matter here presented.

Does it, however, have jurisdiction over the persons? That question was not raised in *Simon*. It is raised here. The parties present no authority as to the character of procedure or process as it relates to these motions, although they do support their contentions by the various references to the Federal Rules and judicial holdings and dicta.

I have before me a criminal proceeding, not a civil action; and I sit as a criminal court, not a civil court. Although I may look to civil and perhaps equitable precedents, I am presented with no authority which points to the Federal Rules of Civil Procedure as directing procedural process here.[7] I do not ignore Federal Rule of Civil Procedure 1 which says "Scope of Rules. These rules govern the procedure in the United States district courts in all suits of

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7. References to the Federal Rules of Civil Procedure are made in the Federal Rules of Criminal Procedure. However, more directly, Federal Rule of Civil Procedure 65(a) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party."

a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81." I have carefully examined Rule 81 and note with what particularity inclusions and exceptions are set forth for the rules of civil procedure. It contains no reference whatsoever to criminal matters. Nor is there anything contained in the Federal Rules of Criminal Procedure other than that which has been presented by the defendants, as previously stated.

The constitutional rights of all defendants in the pending criminal actions against them is now presented to me as a problem for protective examination. Based upon the *Simon* case, supra, I now hold as Judge Bryan there held that this court does have jurisdiction. On that assumption I have a duty to perform in this regard and I am compelled to bring before me all those who may threaten to shake constitutional mandates, as they may appear to jeopardize the defendants. Since the plaintiffs have raised the question of service, inquiry must be had as to proper basic notice being made upon the necessary parties before injunctive relief could be granted to the defendants.

There is no doubt here that the attorneys representing the plaintiffs and party intervenors were served, and therefore, the necessary and sufficient connection which exists between attorneys and their clients would be sufficient notice upon which, after proper proceedings, a justification for the issuance of injunction could be had sufficient for the purposes here required.[8]

8. This record indicates that while some of the plaintiff intervenors were notified, all the lawyers did receive notice. We consider also that notice to the State of Alaska as an intervenor would be as efficiently given to its counsel of record at Philadelphia.

I hold, therefore, that personal jurisdiction exists here at least as notice was had upon the attorneys upon whom service was made. They will be considered parties to this proceeding to preserve this court's criminal jurisdiction.

Inasmuch as the plaintiffs and party intervenors in the Philadelphia civil actions could act only through, in privity or in concert with their counsel in the circumstances, it would seem that all such parties can and should be bound by an injunction order.

In Ex Parte Lennon, 166 U.S. 548, 17 S.Ct. 658, 41 L.Ed. 1110 (1897), the Court said:

> "The facts that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High, Inc. § 1444; Mead v. Norris, 21 Wis. 310, Wellesley v. Mornington, 11 Beav. 181."

In Reich v. United States, 239 F.2d 134, at page 137, C.A. 1, 1956, cert. den. 352 U.S. 1004, 77 S.Ct. 563, 1 L.Ed. 2d 549, the Court said:

> "* * * It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a person who has been enjoined

> in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued or even served with a copy of the injunction. In re Lennon, 1897, 166 U.S. 548, 554, 17 S.Ct. 658, 41 L.Ed. 1110; Alemite Mfg. Corp. v. Staff, 2 Cir. 1930, 42 F.2d 832 and cases cited. See also Rule 65(d) Fed.Rule Civ. Proc. 28 U.S.C.A. * * *."

The plaintiffs, in their motion to dismiss the individual defendants' motion for an injunction, contend that an additional jurisdictional question is presented in that no "case or controversy" exists as between the co-defendants so as to support the jurisdiction of this court. The plaintiffs rely on several cases, Aetna Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240, 241, 57 S.Ct. 461, 81 L.Ed. 617 (1937); United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). Neither of these cases supports the plaintiffs' contention, for each of them related to the question of the court obtaining jurisdiction of the cases in the first instance, and did not relate to the question of appropriate action by a trial judge in a case where jurisdiction is concededly already vested. Additionally, the Johnson case, supra, was based upon a finding of collusion, and I make no such finding here.

Are the defendants entitled to injunctive relief under the circumstances as here presented? The defendants contend they will be burdened if they are required to proceed in Philadelphia and will be so inconvenienced in their defense in the criminal cases here as to deprive them of due process and a fair trial. As Judge Bryan held in United States v. Simon, supra, and Judge Lord held in the Phila-

delphia cases, the defendants have adequate personnel and are numerous enough as defendants as to be able to bear any possible burden, though inconvenient and heavy, of both the civil and criminal actions.

The defendants contend that if they are compelled to answer at Philadelphia, their rights in the pending criminal cases to demand that the Government meet its burden and present evidence beyond a reasonable doubt against them will be prejudiced by all or any of that which they may be now constrained to present at Philadelphia. It is true that the corporations only are the defendants in the civil actions at Philadelphia and that neither they nor their officers in their corporate capacities have any rights to the Fifth Amendment privilege against self-incrimination. However, it is also true that some of the criminal individual defendants are officers of the civil corporate defendants who may be required to present answers in Philadelphia or compel those over whom they have supervision to present answers which can prejudice them in the criminal actions.

If I were to presently deny the defendants' motion, I am effectually compelling them to make answers which may tend to incriminate them in the event that the Government does not already have such information. I do not doubt that the Government agencies will be alert, as they should be, in their examination of all matters which such Philadelphia defendants might present. Should such answers be divulged under such circumstances, the Government, too, might be harmed because of the objections to the admission of any evidence at the criminal trials, and so possibly make such evidence inadmissible. In any event, one may reason-

ably anticipate that the defendants in the criminal trial would avail themselves of all possible objections (as they would have the right to do) as the circumstances would present. All of which would confuse, and perhaps complicate, the due processing of a fair criminal trial. No one will doubt that I am duty-bound to respect the Government's rights even as I must respect the defendants' rights in a criminal action.

While the individual criminal defendants are not directly defendants in the Philadelphia cases, they are so interlinked in the overall picture so far as any conspiratorial evidence may appear, that it becomes vital at this time. We cannot anticipate or prophesy what will be divulged by answers and production of documents in discovery proceedings, but we may reasonably believe that matters prejudicial to all of the defendants will be divulged at a time prior to that during which they will be compelled to stand trial for the criminal charges. Once this occurs, like the opening of Pandora's box, it may never be recalled or cancelled out. It will then have been too late. It is presently proper to prevent such a probable happening in the future. I now justify that consideration additionally as based upon my examination of the interrogatories and requests for production of documents.

Seventy-one interrogatories were filed in Philadelphia. Some of these interrogatories contained multiple questions. Altogether they attempt to lay open in minute detail the grand jury proceedings by which the indictments in the criminal cases resulted and official, individual and customer activities relating to or in anywise connected with such grand jury proceedings.

Appendix B—Opinion of United States District Court dated August 9, 1967

The motion for production as filed in the Philadelphia civil cases lists a demand for "written, printed, typed, recorded, or graphic matter, however produced or reproduced * * * ", in the period from January 1954 to December 1966 and subsequent thereto. The list enumerates forty-three numbered items for the productions so requested, which include summaries of grand jury investigations, such as subpoenas, testimony, records of various cases and a multiple number of demands for corporate, official, individual, customer and government-related matters. I now find that the constrained answering of these matters by the defendants would result in irreparable injury to the defendants and to the public as it would affect the due and orderly processing of these pending criminal cases before me.[9]

The plaintiffs argue that the issue determined by Judge Lord in the Philadelphia cases is the same as presented for injunctive remedy; that the District Court at Pittsburgh and the District Court at Philadephia have co-existing jurisdiction; that the Eastern District Court received the first jurisdiction and that Judge Lord's discretionary determination binds the Western District Court. With this I cannot agree. The question of postponing discovery in Philadelphia is the same in both Districts, but the jurisdiction and issues as they apply in this District are different. This needs no further discussion because we may, at least for the present, accept the determination made by the District Court and not negated by the Court of Ap-

9. The record discloses that similarly based civil actions for treble damages have been filed in the District Court for the Northern District of California.

peals for the Second Circuit in *Simon*, supra, that there is jurisdiction here.

I should add that Judge Lord's decision was a discretionary one and properly determined under the circumstances of that case. But if the District Court is charged with the duty of conducting a fair criminal trial and has the power (or jurisdiction) to enforce it, it becomes here not one of discretion but of precept. Thus there is this distinction which refutes the plaintiffs' contention that the identical issue was discretionarily adjudicated by Judge Lord. The determination here at Pittsburgh, it appears, is not dictated by any statute or federal rule of procedure. The Supreme Court has declared it to be an inherent power in the trial judge by which the duty is imposed upon him to provide orderly and fair processing of criminal trials, both as relates to the prosecution, the defendants, and variously related third parties. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943).

The court's inherent power to supervise the administration of criminal justice within its jurisdiction was explained by the Supreme Court in McNabb v. United States, supra, 318 U.S. at page 340, 63 S.Ct. at page 613, where Justice Frankfurter stressed the court's "duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The significant difference between the issue existing in Philadelphia from that in Pittsburgh was pointed out by Judge Wisdom in Campbell v. Eastland, 307 F.2d 478, 487, C.A.5, 1962, cert. den. 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502 (1963), in these words:

> "There is a clear-cut distinction between private interest in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure."

I add only that the criminal defendants' right to due process is distinguishable from that of parties in civil actions. In the civil action testimonial compulsion of defendants is a rule. In criminal actions it is an exception.

The defendants charge that the Government will be aided by the civil discovery procedures in the Philadelphia cases and that the Government should not be indirectly granted discovery which exceeds that offered by the Federal Rules of Criminal Procedure. Campbell v. Eastland, supra; United States v. Peck, 150 F.Supp. 262, 264 (D.Del. 1957); In re National Window Glass Workers, 287 F. 219, 226-228 (N.D.Ohio, 1922); See also United States v. Sermon, 218 F.Supp. 871, 872 (W.D.Mo., 1963).

The primary duty for protecting the plaintiffs' rights lies with Judge Lord in Philadelphia. But when, as here, I exercise jurisdiction so as to interfere with the processing of a civil case, I must be mindful of the respective situations of all concerned parties, the plaintiffs at Philadelphia, as well as the Government and defendants here.

I have given considerable consideration to the possible harm which may accrue to the plaintiffs by the granting of a preliminary injunction. I agree with Judge Lord that the plaintiffs are entitled to the right to proceed as quickly as they may in procuring the necessary information by way of Federal Rules of Civil Procedure so that they may be able to recoup whatever losses can be proved as resulting to them.

The plaintiffs complain that they will be harmed by an injunction because of the delay which is imposed on the processing of their treble damage actions, in that memories may dim with time and because of the danger of loss or destruction of the presently available and existing records of various kinds.

This contention is argumentative only and seeks support in the recent reversal by the Court of Appeals for the Third Circuit of a stay of proceedings granted by Judge Augelli in Borda v. American Oil Co. et al., Civil Action No. 947-66 (D.C.N.J., 1966 (Texaco, Inc. v. Charles A. Borda et al., C.A. 3, 1967, 383 F.2d 607). Our Court of Appeals, while approving the overall stay pending determination of a criminal action, nevertheless permitted the deposing of Mr. Borda because of his advanced age. We have no such circumstance before us.

Therefore, while recognizing that the plaintiffs are entitled to speedy availability of discovery processes of persons and records, the delay by the granting of a preliminary injunction will not unduly cause the plaintiffs irreparable harm as weighed against the possible irreparable harm to the defendants. In fact, by a speedier disposition of the criminal actions now pending before me, the plaintiffs are

likely to acquire greater benefits from records divulged in the criminal proceedings under 15 U.S.C. § 16(a).[10]

One other matter should be here discussed. The plaintiffs argue that no priority exists between the two types of actions, that they are constitutionally and equally entitled to proceed in the civil actions for damages as the defendants may be to due process and a fair trial in the criminal proceedings.

We have no directive by statute or rules of procedure as to priorities where civil and criminal proceedings clash, as they appear to do here. But we do have expression after expression for which no authority is needed on the fundamental right or preservation of life and liberty, commencing with the expression contained in the Declaration of Independence. Although property rights may have been included in particularly the words "pursuit of happiness", it is significant that the founders of our country deemed it not of such comparative importance as life and liberty as to mention it in the Declaration of Independence. The whole sentence which speaks of this is here presented as a reference to the specific words used: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This will not deny the constitutional right to property, but that raises no question here, for I can see

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10. 16(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * *.

no prejudicial results to the plaintiffs while here protecting the fundamental rights of the defendants in the pending criminal actions.

As far as constitutional priorities are concerned, we would be in an unreasonable dilemma if we attempted to equalize all constitutional rights. For instance, the right to a fair criminal trial may at times conflict with the right to freedom of the press under the First Amendment. Yet freedom of the press must give way to the extent that it interferes with due process of law and the procurement of a fair trial. Sheppard v. Maxwell, supra; Estes v. State of Texas, supra.

We consider any prejudice which may result to the ultimate criminal defendants from pretrial disclosures from all possible sources. In other motions in these criminal proceedings presently before me, the defendants seek *en camera* hearings because of local and wide-spread publicity attributed to the legal proceedings at Pittsburgh. Although the discovery matters at Philadelphia are presently properly pretrial matters in the civil proceedings there pending, the matters which may be disclosed there undoubtedly would receive the attention of the press. In that connection, Sheppard v. Maxwell, supra, gives strong cautions to trial judges. At page 362, the Court stated:

> "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the

> accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances."

The function of the trial court is to conduct the whole proceedings—trial and pretrial—in an atmosphere of dignity and integrity, so as to shield the trial process itself from external factors. Estes v. State of Texas, supra, concurring opinion of Chief Justice Warren at 381 U.S., page 562, 85 S.Ct., page 1642.

At page 363 of 384 U.S., at page 1522 of 86 S.Ct., the Court added that the courts must be concerned with the protections at such times as the need for protections come to their notice. It cautioned in this respect by these words:

> "But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

It is a duty of the trial judge in such proceedings to protect the accused in a criminal case.

Practical application for the preservation of right to a fair trial is the scale by which reality is weighed. Human experiences and human tendencies bear upon the balance and these we cannot ignore.

Repeating what has already been said, the lawyers on both sides in this criminal proceedings will, as earnestly as they can, represent their respective clients. They will ob-

serve technicalities and use them where they can. They will do this not because of any ulterior motive to detract from a fair trial, but they will do this because of their warranted beliefs in their right to pursue the due process accorded to their respective clients.

The remedies available to the parties before any harm is done to either side comes not at the time of trial when prejudice to the defendants and injustice to the public may prevail, but now at the inception when notice of such possibilities and likelihoods are presented in formal manner. I deem the time to act in this connection is now.

For all of these reasons a Decree granting a preliminary injunction has been entered on the 28th day of July 1967. All motions inconsistent with this Decree will be denied.

All findings of fact and conclusions of law are here incorporated as they may be required by law.

APPENDIX C

OPINION OF DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX C

Memorandum and Order of United States District Court dated June 7, 1967

UNITED STATES DISTRICT COURT

E. D. PENNSYLVANIA

Civ. A. Nos. 41773, 41774

THE PHILADELPHIA HOUSING AUTHORITY, on behalf of itself and all others similarly situated,

Plaintiffs,

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.,

Defendants.

LINDY BROS. BUILDERS, INC. OF PHILADELPHIA, et al.,

Plaintiffs,

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.,

Defendants.

June 7, 1967

JOHN W. LORD, JR., District Judge.

These two suits are civil, treble damage, antitrust actions. Defendants are manufacturers of plumbing fixtures, together with their trade association. The Philadelphia Housing Authority case is a class action brought on behalf of various governmental bodies, such as school districts, cities and states. The Lindy Bros. Builders action is a class action on behalf of builders. The complaints allege that de-

fendants have entered into price-fixing conspiracies violating the Sherman Act.

Defendants request a stay of all proceedings pending the termination of related criminal litigation in the United States District Court for the Western District of Pennsylvania, in Pittsburgh. All defendants join in the motion for the stay. The issues involved center around an apparent clash between the Congressional policy of encouraging enforcement of the antitrust laws by private civil litigants with the right to a fair trial afforded defendants in a criminal antitrust action. The request for a stay will be denied.

The present procedural posture of these cases can be briefly placed into perspective. The complaints were filed on December 21, 1966, after the indictment of the corporate defendants and certain of their officers under two criminal antitrust indictments (Crim. 66—295; 66—296) returned on October 6, 1966 in the Western District of Pennsylvania. The plaintiffs have quite candidly conceded that the subject matter of the present civil complaints closely parallels the subject matter of the indictments pending in the Western District.[1] Prior to the request for a stay in these proceedings, the defendants in the criminal action had filed motions to dismiss the indictments and to suppress key evidence.

The two civil actions pending before this court were designated protracted cases on April 4, 1967. Plaintiffs have

1. Plaintiffs have stated in their "MOTION TO CONSOLIDATE" that:

> "Except for the identity of the plaintiffs and the classes they represent, the allegations of both complaints are the same, being based on the allegations in the government litigation of national price-fixing conspiracies with respect to plumbing fixtures." (Doc. 17 in C.A. 41773; Doc. 15 in C.A. 41774).

already served interrogatories on defendants and have moved for the production of various documents. Numerous motions to intervene as party plaintiff have been filed. The defendants indicate that they will stipulate to these interventions, preserving their rights to plead various defenses. Defendant Crane Co. has requested the transfer of all cases from this district to the Western District, pursuant to 28 U.S.C.A. § 1404(a). See, e. g. Thomas v. Silver Creek Coal Co., 264 F.Supp. 833 (E.D.Pa.1967). Defendants Kilgore Ceramics and Georgia Sanitary have filed motions attacking venue in this district and seek dismissal. See generally, Timberlake, Federal Treble Damage Antitrust Actions (1965) § 5.04. All of these matters have been held in abeyance pending determination of the motion to stay. In light of the denial of defendants' request for the stay, these matters will be considered by this court at the request of all interested parties.

DISCUSSION

It has not been questioned that it is within the ambit of this court's discretion to grant or refuse the request for a stay. Landis v. North American Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). In *Landis,* Mr. Justice Cardozo pointed out that the party requesting a stay "* * * must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay * * * will work damage to someone else." Id. at 255, 57 S.Ct. at 166. Certainly any inequity faced by the defendants in these actions must be counterbalanced by the hardships and inequities facing plaintiffs if a broad stay of all proceedings were to be imposed.

Appendix C—Memorandum and Order of United States District Court dated June 7, 1967

At the outset, it becomes critical to note that the private treble damage action was designed by Congress to serve a dual purpose. Congress intended that those injured by antitrust violations recover their damages. In addition, the treble recovery mechanism was " * * intended to use private self-interest as a means of enforcement * * * " of the antitrust laws. Bruce's Juices v. American Can Co., 330 U.S. 743, 751, 67 S.Ct. 1015, 1019, 91 L.Ed. 1219 (1947). Accord, Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318, 85 S.Ct. 1473, 1476, 14 L.Ed.2d 405 (1965), where the Supreme Court commented: "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." See, generally, Report of the Attorney General's National Committee to Study the Antitrust Laws (1956) 378, and, Timberlake, supra., § 3.01. From the specific enforcement role given the private treble damage plaintiff by Congress, it is easy to discern a Congressional interest in the expedited trials of such actions. It would be anomalous to conclude otherwise. The antitrust laws, themselves, function as the Congressional blueprint designed to keep the American economy operating within the free enterprise guidelines mapped out under these statutes. Any threat to the free enterprise footings of our national economic superstructure, constitutes, in Congress' judgment, an immediate and serious threat to our national welfare. The strong incentive of triple recovery encourages private litigants to vigorously enforce the antitrust laws. Against this backdrop, unwarranted stays of proceedings stymie and offset any incentive otherwise contained in the possibility of triple

recovery. Delay tends to discourage prosecution of civil litigation. As time passes, memories of witnesses fade. The inherent value of a claim for damages, enhanced by potential triple recovery, diminishes.[2]

Defendants have outlined two principal arguments in support of their motion for a stay. Initially, defendants contend that a stay of these proceedings, pending the outcome of the criminal actions in the Western District, is necessary to avoid prejudicing their right to a fair trial in the criminal action by a premature disclosure of their defense, or a possible violation of their privilege against self-incrimination. Defendants also maintain that the stay is necessary to avoid the burden of responding to the extensive discovery proposed by plaintiffs, especially when such discovery may hamper the preparation of an adequate defense in the criminal trial, and when much of the discovery may be rendered unnecessary after the trial of the criminal actions. Each of these contentions merits separate discussion.

Defendants have strenuously argued that unless a stay were entered, it would be impossible for them to obtain a fair trial in the criminal actions underway in Pittsburgh. To bolster their argument, defendants have placed pivotal reliance on the district court decision in United States v. Simon, 262 F.Supp. 64 (S.D.N.Y.1966).[3] Defendants argue

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2. See generally, C. A. Bane, "Pretrial Discovery in Multiple Litigation From the Plaintiff's Standpoint", 32 A.B.A. Antitrust L.J. (1966) 117, 129.

3. Rev'd, 373 F.2d 649 (2nd Cir. 1967), execution and enforcement of the reversal stayed by Mr. Justice Harlan on March 13, 1967; cert. granted sub nom. Simon v. Wharton, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967).

that the *Simon* decision stands for the proposition that even if individual criminal defendants do not wish to assert their privilege against self-incrimination, the narrow discovery principles of the Federal Rules of Criminal Procedure will act as a bar to discovery, in a related civil action. Urging the soundness of such a result, the defendants argue that a stay of all proceedings will guarantee that their privileges, as outlined in *Simon*, will be protected. Defendants' reliance on *Simon* is misplaced.

The district court judge trying the criminal action in *Simon* issued an injunction blocking civil depositions of the individual defendants in a related civil action, where these same defendants were also being sued.[4] The subject matter of both the criminal indictment and civil complaint was identical, stemming from the same alleged corporate fraud. The defendants were certified public accountants who did not want to assert their privilege against self-incrimination because of the resulting stigma upon their professional conduct. The district court enjoined the civil discovery during the pendency of the criminal litigation, summarizing the relevant authorities in the following fashion:

> The problem is by no means novel. It has been consistently held that where both civil and criminal pro-

4. In *Simon*, the judge sitting in the civil action refused to grant the defendants' request for a stay of all discovery pending the termination of the criminal suit. Instead, the defendants were ordered to attend the civil depositions and assert their privilege against self-incrimination, where warranted. If a stay of proceedings had been entered in the civil suit, no civil discovery motion would be entertained during the pendency of the blanket stay. See, Evans v. Hudson Coal Co., 84 F.Supp. 740 (M.D. Pa.1949). See, generally, 2A Barron & Holtzoff, Federal Practice and Procedure § 800.

> ceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter. This has been true whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence [citing Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962) and analogous cases], or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution. [citing cases.] 262 F.Supp. at 74.

The Second Circuit based its reversal on the fact that the two lines of cases outlined in the above excerpt were distinguishable. The Second Circuit placed the cases into two categories.

The first category involved situations where the government seeked to block disclosure of its criminal investigation through discovery in a related civil action brought against the government by the criminal defendant. Campbell v. Eastland, supra., is typical of this first category. In *Campbell,* the Fifth Circuit would not allow a criminal defendant to side-step the narrow discovery rules applicable to the criminal action through the vehicle of a simultaneous civil action designed to obtain discovery of the government's criminal investigation reports, then in the hands of the United States Attorney. One of the primary reasons for the injunction in *Campbell* was that once the defendant obtained a preview of the government's case, he could then be expected to block any reciprocal discovery by the government by asserting his Fifth Amendment privilege against self-incrimination. 307 F.2d at 487.

However, the Second Circuit concluded, in *Simon*, that those cases in the second category indicate that the criminal defendant himself may seek to enjoin discovery in related civil litigation, when such requests "* * * rests upon the deponent's assertion of his privilege against self-incrimination." 373 F.2d at 654. The reversal in *Simon*, based upon this distinction, appears proper and in full accord with the protections afforded the parties under the Federal Rules of Criminal Procedure. The government is afforded insulation from premature disclosure of its case, absent a mutual discovery situation, while the individual defendant is afforded the full and thorough protections of his Fifth Amendment privilege against self-incrimination. Such a result is in full keeping with the criminal procedure rules.[5]

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5. The Federal Rules of Criminal Procedure, in Rule 16(c), provide the government an opportunity for discovery if the defendant wishes to make use of the liberal discovery mechanism of Rule 16. An interesting application was made in an antitrust context, by the Advisory Committee, in the Committee Note accompanying the adopted amendments to Rule 16(c), which apparently bolsters the position adopted by the Second Circuit in *Simon*. The Committee stated:

> This subdivision [subsection (c) of Rule 16] permits the court to condition its disclosure order by requiring the defendant to permit the government to inspect items which he intends to produce at trial and which are within his possession, custody or control. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining unfair advantage. For example, * * * in cases (*such as antitrust cases*) in which the defendant is well represented and well financed, *mutual disclosure so far as consistent with the privilege against self-incrimination would seem appropriate as in civil cases.* [emphasis supplied.] 8 Moore's Federal Practice (2d ed. 1966) ¶16.07 [2]; 39 F.R.D. 177 (1966). See generally, "Discovery in Federal Criminal Cases", 33 F.R.D. 47 (1963).

Denial of a stay of proceedings at this juncture does not pose a serious threat in undermining anyone's privilege against self-incrimination. The defendant corporations and trade association are not afforded the privilege, nor can they refuse to make discovery in these civil actions on the basis of such a claim.[6] Furthermore, because of the insulation afforded individuals under the Immunity Act (15 U.S.C.A. § 32) plaintiffs may quite properly obtain discovery from defendants' employees who have testified before the grand jury.[7] As to the individual defendants, they will be afforded the full protections of their privilege against self-incrimination.

Defendants contend that the stay of these proceedings is necessary to afford them a full and adequate opportunity to concentrate on the preparation of their defenses to the criminal actions in the Western District. It is interesting to note that in the *Simon* case, the district court (in the criminal action) refused to enjoin any civil discovery involving the defendants' accounting firm, concluding that the "* * * criminal defendants have ample legal manpower at their disposal * * * [and there] is no likelihood that the defendants' preparation for trial will be unduly hampered * * *." 262 F.Supp. at 78. The fears of the present defendants, of oppression and harassment while at the mercy of plaintiffs' discovery, are unfounded. The criminal actions in the Western District are not on the eve of trial.

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6. United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); United States v. Forty-Two Jars, 264 F.2d 666 (3rd Cir. 1959).

7. See, United States v. Welden, 377 U.S. 95, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964); Rutherford v. United States, 365 F.2d 353 (9th Cir. 1966).

The defendants have not made any demonstration of oppressive burden at this time that would warrant a stay of all proceedings. If, in the future, the criminal action approaches an involved stage and the plaintiffs' discovery, pending at that time, reaches such proportions as to seriously interfere with the defense of the criminal actions, application can readily be made to this court for appropriate relief, such as a short term protective order.[8]

In conclusion, the above discussion briefly touches upon some of the factors which have affected this court's determination not to grant the stay. After a careful consideration of the briefs and points raised in argument on the motion, it is the opinion of this court that a stay of all proceedings at this juncture is unwarranted, especially in view of this court's concern to expedite the progress of these civil, treble damage, antitrust actions.

Defendants' motion requesting a stay of all proceedings denied.

And it is so ordered.

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8. The defendants have called the court's attention to Judge Anthony T. Augelli's ruling in Borda v. American Oil Co., (C. A. No. 947-66, U.S. District Court for the District of New Jersey) where he granted a stay in the civil private antitrust action pending termination of the criminal action in Newark. This court is in complete accord with Judge Augelli's conclusion that the granting of the stay is "* * * a matter resting in the sound discretion of the Court."

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

APPENDIX D

Constitutional Provisions, Statutes and Rules Involved

U. S. Constitution

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

Rules of Criminal Procedure for the United States District Courts

Rule 2. Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 57. Rules of Court.

(b) PROCEDURE NOT OTHERWISE SPECIFIED. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.